85-240

NO. ____

Supreme Court, U.S.
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

Merrill J. Chapman,

Petitioner,

v.

Smith Barney, Harris Upham & Co., Inc.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

Merrill J. Chapman
Petitioner pro se
49 Chambers St.
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93pp

QUESTIONS PRESENTED

Where the opinion of the court below was factually erroneous in critical parts; where the court below provided no hearing on the "increased time" affidavit seeking counsel fees; rendered judgment based on allegations never noticed to petitioner; refused an evidentiary hearing to petitioner based on specific charges; and

Where the Committee on Federal Courts of the Association of the Bar of the City of New York has voiced deep concern over the practice of the Second Circuit denying due process and fundamental fairness to attorneys:

1. Did the court below deny due process to petitioner?

2. Did the court below abide by the dicta and instruction of this Court before sanctioning petitioner?

3. Did the court below abide by the mandate of Congress "to afford the attorney all appropriate protections of due process available under the law"?

4. Did the court below abuse discretion and assess sanctions against petitioner in an arbitrary and capricious fashion?

5. Does the Second Circuit have authority to legislate the demise of the "American Rule" by fiat of certain of its panels?

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OPINIONS BELOW

The petitioner Merrill J. Chapman respectfully prays that a writ of certiorari issue to review the opinion and

judgment of the United States Court of Appeals for the Second Circuit rendered in Slip Opinion No. 853, dated March 6, 1985 on appeal from the opinion and judgment of the United States District Court for the Southern District of New York reported as 579 F Supp 657. Unappealed decisions dismissing claims in the underlying complaint are reported at 548 F Supp 1172 and 95 FRD 182.

JURISDICTION

The jurisdiction of this court is invoked under 28 USC 1254(1). The judgment of the Court of Appeals for the Second Circuit herein was entered on March 6, 1985. An extension of time within which to file and docket this petition for writ of certiorari was granted by Justice Marshall on May 28, 1985 to and including July 3, 1985.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS.

This case involves the due process clause of the United States Constitution, the Fifth Amendment thereto, which reads:

> No person shall ... be deprived of life, liberty or property, without due process of law;

28 USC Section 1927, which reads:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Rule 11 of the Federal Rules of Civil Procedure (prior to 1983 amendments):

> Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by

affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule; it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

STATEMENT OF THE CASE

This case was commenced in the Southern District of New York as a diversity action by plaintiffs Anthony and Lois Tedeschi, residents of New Jersey, against Smith Barney, Harris Upham Co.,Inc.("Smith Barney"), with main office and principal place of business in New York City, and two of its employee-agents.

The suit resulted from defamation of Mr. Tedeschi by Smith Barney and malicious institution of arbitration proceedings by Smith Barney against him without any factual or legal basis. In the arbitration, Smith Barney presented no evidence whatsoever in support of its alleged claims but instead used certain documents with intent to deceive the arbitration panel. In six claims, the most prominent of which were malicious prosecution and fraud on the court, the Tedeschis sought compensatory and punitive damages.

In short, this was a "whistle-blowing" case exposing deceitful and unethical practices of the Smith Barney legal department.

A series of dismissal motions was made by the defendants and subsequently granted by the district court and a final judgment of dismissal of the complaint was entered on March 24, 1983.

By post-judgment motion dated April 29, 1983, attorneys for the defendants moved for an award of attorney fees and costs under 28 USC 1927, Rule 11 of the Federal Rules of Civil Procedure ("FRCP") and the "equitable power of this court". The motion was heard on June 7, 1983 and the district court on January 17, 1984 granted the motion and awarded the amount of $10,000 against plaintiffs and their attorney. The award was apportioned $4000 against Mr. Tedeschi, $1000 against Lois Tedeschi and $5000 against their attorney, Merrill J. Chapman, petitioner herein.

It is to be noted in passing that these sanctions against the Tedeschis were unwarranted under guidelines laid down by this Court. Alyeska Pipeline Service Co. v Wilderness Society, 421 US 240, 259 at note 31(American Rule applies in a diversity action); Roadway Express v Piper, 447 US 752, 767 (finding of bad faith is condition precedent to sanction).

In a per curiam opinion, the Second Circuit panel, referring to the opinion of the district court as "thorough and thoughtful", adopted that opinion as its own and affirmed "for substantially the reasons set forth " by the district court and proceeded to assess additional damages of $1500 and double costs against this petitioner, "for taking a frivolous appeal." For this reason all references to the "court or opinion below" in this petition refer interchangeably to both the district and appeals court.

Denial of Due Process

In four principal areas the court below failed and refused to afford to this petitioner requisite notice and opportunity to be heard together with that fundamental fairness which subsumes the concept of "due process":

1. Factual recitations of case history are garbled and erroneous and in other part distorted by the district court. Where this was pointed out on appeal, it was ignored with no opportunity to correct the record.

2. The district court failed and refused to provide any opportunity to refute the Smith Barney post-hearing affidavit of the alleged "increased time" incurred by the defendant (28 USC 1927) which had not been included in the motion papers or presented orally.

3. Allegations of misconduct were recited in the district court opinion which were never noticed to this petitioner and which are untrue.

4. An evidentiary hearing based on specific charges was denied to petitioner although repeatedly requested.

One garbled and erroneous factual recitation of events is in the statement at A-12 (Appendix "A", p. 12): "It is not without significance that despite the reminder regardng Rule 11, as set forth above, at a hearing on a subsequent motion plaintiff's counsel stated: ..." The dates here are reversed by six months and this juxtaposition destroys the rationale for sanction being enunciated at that point.

In addition to this factually erroneous misstatement, there is distortion of fact relative to the central accusation made against petitioner by the court below. It is asserted that the complaint alleged the introduction of a `non-existent' document into the arbitration proceeding against Mr. Tedeschi by Berglas, a Smith Barney attorney, but the document did `exist' and therefore attorney Chapman was "reckless and mendacious" for basing a claim thereon (A-11).

The complaint, however, did not question the 'existence' of the document, qua document. The complaint alleged that it was passed off on the arbitration panel as a bona fide part of a legal proceeding. It was not -- and respondent (in the arbitration hearing, Mr. Tedeschi) proved it by examination of the New Jersey court file. This was a fraudulent use of the document which worked a deceit upon the judicial arbitration panel. Nothing could be further from the truth than to insist that the complaint in the action characterizes the document in issue as irregular for mere "procedural defects".

As to No. 2, denial of due process is patent in the June 7, 1983 motion hearing. On the argument, moving counsel, who had not supplied any affidavit supporting "excess costs" (28 USC 1927), was ordered by the court to file a post-hearing affidavit detailing the "increased time"

costs and attorney's fees allegedly incurred in defending the action.

While the court ordered the supplemental affidavit to be served "on the other side" and filed within 48 hours, it provided no opportunity to plaintiffs and this counsel to further respond or to be heard. Attorney Chapman objected to the procedure during the hearing and demanded full notice of exactly what charges were being made together wilh "all appropriate protections of due process."

The court below charged the defendants' belated affidavit to be "as excessive as plaintiffs' charges against the defendants were ill founded." (A-16,17). Nevertheless, in an ex parte and ad hoc fashion the court below picked a round sum out of the air and apportioned it among the plaintiffs and attorney.

Third, denial of due process is further demonstrated by a series of accusations leveled against this petitioner in the eventual fee opinion and judgment. The accusations were for the most part never noticed to petitioner.

An important sample of an accusation not noticed to petitioner is found in the district court opinion at A-14):

> He repeatedly failed to attend sessions on time, necessitating delays and wasting the time of opposing attorneys; ...

This accusation was not even mentioned in the defendant's motion for attorney fees or by the district court on the hearing. This petitioner has no knowledge of any 'session not attended on time' let alone "repeatedly."

The balance of the assertions made on that same page (A-14,15) is equally not factual or a distortion of fact. More importantly, the assertions are so generalized and categorical they give no notice of what specific misdeed supports a sanction. In any event, they were stated in tandem with the sanction decision with no opportunity to be heard, to explain, contradict or otherwise speak in mitigation. With reference to one accusation, however, "he [Chapman] failed to adhere to stipulations" there was one occasion when on an oral application for an adjournment to answer a motion, this petitioner wrote down an incorrect return date and did not serve the answering paper timely. This matter was settled by stipulation and approved by the Court without further ado. (Does this warrant a $10,000 sanction?)

The court below generally asserted that plaintiffs and their counsel had

proceeded in bad faith; that attorney Chapman was reckless and a liar; and guilty of professional misconduct. The Court must note that not a scrap of evidence was recited in support of the charges for the simple reason there had not been an evidentiary hearing. The repeated recitation of snippets of quotations from other cases (A-14,15) cannot substitute for facts developed on a due process record.

Fourth, petitioner was deprived of due process by denial of just such an evidentiary hearing. Your petitioner, faced primarily with sweeping generalities, categorical conclusions and opprobrious adjectives (Morgan v Sylvester, 125 F Supp 380, 390 {SDNY 1954}) on June 7, 1983 recited from the legislative history of 28 USC 1927 (annexed) that:

> The managers' intent is that judges applying Section 1927 will safeguard the rights of an attorney who may be held in violation of this section. Before sanctioning an attorney under Section 1927, the court is to afford the attorney all appropriate protections of due process available under the law.

and then continued:

> I would object to any proceeding aganst me, as counsel now seems to be attempting, without recognition of this mandate of the Congress. I don't know just what "all appropriate protections of due process" are available under the law at this point. But certainly notice of exactly what actions specifically charged would be one of them. Since counsel has chosen on previous motions to refer to the arbitration proceedings upon which I have based the entire complaint in this matter, he could not bring any sanctions against me without proceeding on a full arbitration record and not the piecemeal, self serving portions thereof that were presented to this court in the previous affidavit,....

Thus an evidentiary hearing has been requested on June 7, 1983 and it has been requested under Federal Rule of Appellate Procedure 46(c) in the main appeal brief

dated December 31, 1984, in the reply brief dated February 25, 1985 and on the oral argument of March 6, 1985. All the requests were ignored.

No attempt has been made in the foregoing statement of the case to comment seriatim on each and every facet of the judgment opinions below.

REASONS FOR GRANTING THE WRIT

1. THE WRIT OF CERTIORARI SHOULD BE GRANTED FOR REASONS PRESENTED BY THE COMMITTEE ON FEDERAL COURTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK.

This petition hereby incorporates by reference the report of the Committee on Federal Courts in the May/June edition of THE RECORD of the Association of the Bar of the City of New York ("City Bar"), Volume 40, Number 4. The report is entitled "Procedural Rights of Attorneys Facing Sanctions" and is found at page 313 of THE

RECORD. The report is annexed as Appendix "B" using original pagination and referred to as "Committee Report".

The Committee Report aptly covers the issues presented on this petition for certiorari and underscores the importance of and timeliness of this petition. Both documents emphasize the denial of due process being promulgated by the Second Circuit:

> Of most immediate concern, a number of recent court decisions appear to have imposed sanctions on attorneys without providing for notice and opportunity to be heard and without even discussing the serious due process issues and related concerns of fundamental fairness raised thereby. In recent years, the United States Courts of Appeals for the Second Circuit has fallen into this practice. In our view, these decisions impermissibly ignore existing Supreme Court precedent and fail to afford fundamental procedural rights to the individual attorneys involved.
>
> ***

> This Report focuses upon the procedural safeguards which the Committee believes should be required before a federal trial or appellate court may impose sanctions on attorneys. The Committee has concluded that traditional requirements of notice and opportunity to be heard must be observed and that ... disputed issues of fact require an evidentiary hearing. (Committee Report, p. 313, 314, original pagination followed).

This courageous Report was underscored at a recent forum at the City Bar, sponsored by this same Committee on Federal Courts, when a prominent "class-action, plaintiff's lawyer" and panelist (not a member of the Committee) described the wave of attorney sanctions as an "evil thing".

THE COMMITTEE REPORT ANSWERS THE QUESTIONS PRESENTED IN THIS PETITION.

The thorough review of the due process issue by the Committee Report demonstrates that the questions presented to the Court on this petition are timely, national in scope and warrant careful review by this Court.

Question No. 1 asks if the court below denied due process to petitioner. The Committee Report states that full notice and opportunity to be heard and to explain, clarify or seek mitigation of the sanction should be provided (p. 324-326, passim). Where factual issues are in issue an evidentiary hearing should be provided (p. 324, par.2):

> The failure to afford such a hearing in the face of a genuine factual issue as to these elements constitutes reversible error.

In addition to factual issues previously touched upon, which alone mandate reversal, the factual issue as to the use of and role played by the 3rd Party Complaint remains wide open. While the court below focused upon this issue, petitioner was denied an appropriate evidentiary hearing to present defenses to the accusation of bad faith and "to present ... the

opinion of a second attorney expert in that area of the law" which petitioner is quite prepared to provide (p. 326, par. 2).

Question No. 2 is answered by this Court in Roadway Express v Piper, 447 US 752 (1980):

> Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record.

(See, p. 317 of Committee Report).

The answer to Question No. 3 is in the negative -- the court below did not afford this petitioner "all appropriate protections of due process available under the law" prior to the imposition of sanctions, as mandated by the Congress. (The House Committee Report is annexed in Appendix "B" and commented upon at p. 319 and 324 of the City Bar Committee Report).

Explicated, supra, in the Statement of the Case, are the several occasions when petitioner demanded a Rule 46(c) FRAP hearing. The court below abused discretion

and acted arbitrarily and capriciously in denying the hearing (Question No. 4). The rule reads:

> A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

Furthermore, the Committee Report calls the question of whether the court of appeals has explicit authority under Rule 38 FRAP to impose an additional sanction against petitioner. See, Committee Report, note 29 and 30, p.331.

***

The answers to the preceeding questions are themselves answer to Question No. 5. The 2nd Circuit has no authority to legislate the demise of the "American Rule". It is equally apparent that the Second Circuit has maneuvered itself into an adversary position with the 5th Amend-

ment to the U. S. Constitution ("[t]he fundamental requisite of due process of law is the opportunity to be heard" Grannis v. Ordean, 234 US 385, 394) and is in a due process conflict with other circuits.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO PROVIDING DUE PROCESS TO ATTORNEYS.

The Second Circuit conflict with the Constitution can hardly be presented more concisely and impressively than by the Committee Report in Section II commencing at p. 316. In addition to the conflict with the U. S. Constitution. the Second Circuit is in conflict with several other -- if not all -- circuits. Here the Committee Report can be amplified a bit.

The Conflict With Other Circuits

The 6th Circuit recently reviewed en banc the entire subject of attorney fees sanctions. In Shimman v International Union of Operating Engineers, Local 18, 744 F 2d 1226 (1984). The full court spoke to

the matter of "bad faith" in words expressly applicable to the instant petition. Id. at 1231:

> To allow an award of attorneys fees based on bad faith in the act underlying the substantive claim would not be consistent with the rationale behind the American Rule regarding attorney fees. By refusing to penalize a litigant whose judgment concerning the merits of his position turns out to be in error, the American Rule protects the right to go to court and litigate a non-frivolous claim or defense.

The court thus protects the policy of open access to our courts to redress grievance even in the face of "bad faith." Despite assertions of the court below, an evidentiary hearing would not reveal any such bad faith in this case, except for that of Smith Barney.

The 9th Circuit agrees. In Miranda v Southern Pacific Transportation Co., 710 F 2d 516, 522 (1983) the court heard appeal by two lawyers who had been sanctioned by the district court. The court concluded in

a sensitive and balanced decision that:

> Absent extraordinary circumstances, procedural due process requires notice and hearing before any governmental deprivation of a significant property interest. Boddie v Connecticut, 401 US 371 (1971).
>
> ***
>
> Recently, the Supreme Court cautioned that "like other sanctions, attorneys fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." (cite omitted).
>
> ***
>
> There are, in fact, several compelling reasons why notice, an opportunity to prepare a defense, and a hearing are required before sanctioning counsel. These procedural requirements will ensure that: (1) the attorneys will have an opportunity to prepare a defense and to explain their questionable conduct at a hearing; (2) the judge will have time to consider the severity and propriety of the proposed sanction in light of the attorney's explanation for their conduct; and (3) the facts supporting the sanction will appear in the record, facilitating appellate review. See Weiss v Burr, 484 F2d 973, 983-87 (CA9 1973, cert den, 414 US 1161 (1974).
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> ***
>
> In conclusion, we hold that the district court does not have the power to impose monetary sanctions against attorneys without affording them procedural due process as protective as that afforded by Fed R App P 46(c).

The court below cited Lipsig v Nat'l Student Marketing Corp, 663 F2d 178 (CADC 1980) but there the DC Circuit explicitly approved a due process procedure which the 2nd Circuit has now explicitly denied to petitioner:

> Procedurally, the counterdefendants will file itemized accountings and address the pertinent factors, and the Bieglers will be afforded an opportunity to respond. [Fee Opinion, 78 FRD 726, 727, 731-32 n. 17]. We approve that practice (emphasis supplied). Id. at 181.

The 7th Circuit joins the lineup in conflict with the 2nd Circuit. In Overnite Transportation Co. v Chicago Industrial Tire Co., 697 F 2d 789, 794 (1983) that court held:

> Litigants and their attorneys must be free to pursue their appellate remedies except in truly unmeritorious and frivolous cases. We reject Chicago Industrial Tire's position, for if we were to accept their argument it would have a profound chilling effect upon litigants and would further interfere with the presentation of meritorious legal questions to this court.

It also appears that the 2nd Circuit is beset with internal conflict among the panels. In U. S. v Lumumba, 741 F 2d 12 (CA2 1984) a due process panel, reviewing benchmark (and landmark) cases of the Supreme Court held that attorney Lumumba was denied substantive due process where procedural care was not observed:

> Argument by way of defense and mitigation after sentence is akin to closing the barn door after the horse has escaped; it is a bit late. Regardless of that, here there was no opportunity for counsel to address the charges against him either before or after the adjudication of contempt.

See, also, due process concerns addressed in Burtnieks v. City of New York, 716 F 2d 982 (CA2 1983) and compare Miranda, supra, 710 F 2d at 522: "Other forms of sanctions may not be imposed without affording similar procedural protections." These rights are particularly important in situations such as that presented in this petition where sanctions are imposed based on "incorrect or misleading factual premises." Goldberg v. Kelly, 397 US 254, 268.

***

The Committee Report in its introduction (p.314) provides apt summation of all the above arguments. It points the way to elimination of this "evil thing"; provides for balance "where personal prejudices and emotions of a judge or the institutional biases of a court are permitted to enter into the sanctioning process" (p. 321); and, can prevent undue reflection on professional repute (p. 314).

> It is imperative, in our view, that Bench and Bar undertake a prompt and searching inquiry into the procedural safeguards which must be observed prior to the imposition of sanctions.

SUMMARY AND CONCLUSION

This Petition should be granted. The issue has nationwide ramifications for multitudes of Americans, already denied access to the courts by mounting legal costs, will find they cannot obtain representation at any cost. An irreconcilable conflict among circuits has developed. The facts, supra, show that due process was denied to petitioner; the court below has spurned the instruction of this Court that "as with other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." (Roadway Express v Piper, 447 US 752, 767); there can be no question that the congressional mandate "to afford the attorney all appropriate protections of due process" was ignored; the abuse of discretion by the court below is patent where a FRAP Rule 46(c) hearing is repeatedly requested and denied. The Court

has a unique opportunity through this Petition to correct injustice and at the same time address an issue of national import viewed with increasingly deep concern by important elements of the Bench and Bar. The due process horse must immediately be returned to the protection of the Constitutional barn.

WHEREFORE, the Court is respectfully requested to grant this Petition for a Writ of Certiorari to the Second Circuit Court of Appeals for all the reasons advanced both in this Petition and by the Committee on Federal Courts of the Association of the Bar of the City of New York.

Dated: June 28, 1985

New York, New York

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APPENDIX "A"

1. Opinion, District Court, 1 - 24

2. Opinion, Court of Appeals 25 - 27

TEDESCHI v SMITH BARNEY, HARRIS UPHAM & CO., INC., No. 81 Civ. 6938, U.S.D.C., Southern District of New York
579 F. Supp. 657
May 24, 1983

[658]

OPINION

Edward Weinfeld, D.J.

This action was the aftermath of an arbitration proceeding, the parties to which were Anthony Tedeschi ("Tedeschi"), a registered broker, and his former employer, Smith Barney, Harris Upham & Co., Inc., an investment broker. The basic issue submitted to the arbitrators was whether Tedeschi, as the account executive servicing the account of a customer knew or should have known, and failed to report, [659] that the latter ("the defalcating customer") had received stock to which he was not entitled. Smith Barney sought recovery from Tedeschi for the loss sustained as a result of the transaction and Tedeschi interposed a counterclaim for defamation of character.

Neither party prevailed upon the respectively asserted claims. Smith Barney was represented in the proceeding by Martin S. Berglas ("Berglas"), assistant general counsel on its legal staff. Tedeschi was represented by Merrill J. Chapman ("Chapman").

Soon after the termination of the arbitration Tedeschi, represented by Chapman, commenced this action against Smith Barney, Berglas and John Maine ("Maine"), the manager of the Smith Barney branch where plaintiff had been employed who had testified before the arbitrators with respect to matters pertaining to the defalcating customer's account. The complaint, among other matters, alleged that when Maine learned that Tedeschi decided to leave Smith Barney to become affiliated with another investment firm, Maine threatened to sue Tedeschi for money owed by the defalcating customer;

that thereafter Smith Barney instituted the arbitration proceeding under the New York Stock Exchange rules. The amended complaint {1} sought recovery of damages under five separate claims:

(1) false and malicious prosecution because the arbitration was instituted without probable cause;

(2) abuse of process because Smith Barney had, prior to the arbitration, instituted an action against the defalcating customer in a New Jersey state court and that action was its sole remedy;

(3) defamation based upon an unsigned employment verification questionnaire allegedly prepared by Maine that falsely stated that Tedeschi had been "discharged" by Smith Barney and that he was of "questionable loyalty and ethics";

(4) fraud on the court (the arbitration panel) allegedly committed by Berglas in violation of New York Judiciary Law

Sec. 487; and

(5) emotional, mental and psychic distress.

A sixth and separate claim was asserted on behalf of Lois Tedeschi, plaintiff's wife, seeking recovery of damages because, as she alleged, by reason of defendants' conduct her husband became "ill, sick, nervous, irritable" and as a result she was deprived of his services as a husband and a father to their children.

After a series of motions made by the defendants, this Court eventually dismissed all plaintiffs' claims and judgment was entered in favor of the defendants. Familiarity is assumed with the various rulings and other actions taken, which set forth the reasons therefor. {2}

The defendants now move for an order pursuant to 28 U.S.C. Sec. 1927, Rule 11 of the Federal Rules of Civil Procedure {3} and [650] the inherent equitable power

of the Court, for an award of reasonable attorneys' fees and costs to be assessed against plaintiffs and Chapman. While under the traditional "American Rule" each side ordinarily bears its own litigation fees and expenses, the Supreme Court has excepted the instance where the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons ...."{4} Our Court of Appeals has observed that the exception is to be applied with caution so that those with legitimate claims are not deterred from their enforcement, but it must be enforced in appropriate cases to spare parties the financial expense and waste of time in defending against baseless allegations.{5}

Preliminarily, procedural objections are advanced to defeat the motion. First, it is argued that the motion seeks to alter or amend the final judgment and was not made within ten days after its entry

as required by Rule 59(e) of the Federal Rules of Civil Procedure. However, the Supreme Court has held that Rule 59(e) is inapplicable to a post judgment request for counsel fees made pursuant to 42 U.S.C. Sec. 1988{6} There is no sound basis for applying a different rule in an action where the fees are sought under the authority of the Federal Rules of Civil Procedure and the Court's inherent equitable power.{7} The application for fees "raises legal issues collateral to the main cause of action -- the issues to which Rule 59(e) was never intended to apply."{8}

Next, it is contended that since this is a diversity action it presents, as the Supreme Court noted in Alyeska, a "very different situation."{9} and that New York State rigidly enforces the American Rule. However, despite plaintiffs' contention to the contrary, New York State

does acknowledge exceptions to the rule, particularly when a litigant's malicious acts cause a person to incur legal fees.{10} But even if the New York rule were otherwise, it does not supersede the inherent equitable power of this Court, the provisions of section 1927 [661] of Title 28 and Rule 11 of the Federal Rules of Civil Procedure. Once the litigation was instituted in this Court, plaintiffs, as well as the defendants, were subject to those and other authorities which govern and apply to their conduct and that of their counsel. Thus, plaintiffs' procedural challenge to the motion fails and we consider it on the merits.

An essential requirement underlying fee shifting, contrary to the general American Rule, is a finding of bad faith on the part of the unsuccessful litigant. An action is brought in bad faith when the claim is entirely without color and has

been asserted wantonly, for the purpose of harassment or delay, or for other improper reasons.{11} The bad faith exception justifying an award of counsel fees and other expenses of the litigation extends both to the filing and the prosecution of the litigation.{12} The sanction is imposed under the court's inherent equitable power when the interests of justice so require.{13}

The assessment of fees for bad faith conduct, when exercised under the court's equitable power, may be imposed upon the errant litigant and his lawyer.{14} On the other hand, under Rule 11, which also invokes a bad faith concept{15} the assessment of fees may be imposed only against the attorney. Similarly, under section 1927 of Title 28, the thrust of which is "to curb dilatory practices and the abuse of court processes by attorneys,"{16} it is the lawyer who is

personally taxed with the "excess costs, expenses and attorneys' fees" reasonably incurred where the lawyer "unreasonably and vexatiously" multiplies the proceedings.

Determination of the motion now before the Court requires a concerned and balanced judgment. If granted, it imposes financial sanctions upon both the unsuccessful litigants and their lawyer, but more important, in the case of the lawyer it carries with it condemnation of his professional conduct. Taking into account all relevant matters, this Court, sensitive to its heavy responsibility, is persuaded that this action was instituted in bad faith, without a legal or factual basis to support the asserted claims, with a possible exception of that of false defamation,{17} and that the litigation activities that followed were vexatious and intended to harass the defendants.

Each of the other claims was patently without substance and color of law. No reasonable attorney could have concluded that allegations supporting the claims might be established.{18} The attorney's conduct was particularly flagrant since he respresented Tedeschi at the arbitration hearing. This was not a case where the attorney had to rely upon information received from the client and yet to be established. He knew, by reason of his representation of Tedeschi in the arbitration, all the facts upon which the claims in this action were advanced and must have known the claims were groundless. The conclusion is warranted that the commencement and prosecution of the suit were intended as an in terrorem force upon the defendants after neither party had prevailed in the arbitration proceeding.

The egregious conduct of plaintiffs and their attorney is underscored by what can only be described as the reckless and mendacious allegation leveled in count four [662] against Berglas, the attorney who represented Smith Barney at the arbitration. He was charged with conduct designed to deceive a judicial forum -- in this instance the Board of Arbitration -- a claim authorized under New York law, which if upheld is a misdemeanor and imposes treble damages in favor of the injured party.{19} With respect to one portion of this claim the Court, in granting defendant's motion to dismiss, stated:

> The plaintiffs' claim herein is based upon statements made by defendant Berglas, the attorney representing Smith Barney, to the arbitration panel, the substance of which is that in the New Jersey action instituted by Smith Barney against the defalcating customer he in turn asserted a third-party complaint against Tedeschi. Plaintiffs argue that because of procedural defects with respect to the service and filing of the third-party complaint, that the

> complaint did "not exist" and was a "false and fraudulent document." This allegation is a distortion of what was said with respect to the third-party complaint and is without substance. A third-party complaint against Tedeschi was prepared by the defalcating customer's attorney and served upon the attorney for Smith Barney, the plaintiff in the New Jersey action. A copy of the complaint is part of this record. Whatever the merits of the claimed defects in the service or filing of the complaint, this does not detract from the truth of the statement made by the attorney at the arbitration that a third-party complaint was in existence and had been submitted. The simple fact that will not down is that a third-party complaint had been served upon the attorney for the plaintiff in the New Jersey action and was in existence at the time Berglas made the statement. Indeed, at the arbitration hearing, Tedeschi's attorney, who represents him in this action, acknowledged that he had received a copy of the third-party complaint against his client. The concept of this claim borders on the frivolous and plaintiffs' counsel is reminded of his obligation under Rule 11 of the Federal Rules of Civil Procedure.{20}

It is not without significance that despite the reminder regarding Rule 11, as set forth above, at a hearing on a subsequent motion plaintiff's counsel stated: "I have reviewed the statute under which

the claim is brought and discussed the Court's position with plaintiffs and they decline to withdraw the claim No. 4 alleging fraud on the Court for the following reasons: (a) it is the major claim in the complaint and allows treble damages." Thus, plaintiffs bear equal resonsibility with the attorney for pressing this baseless claim.

Thereafter, the remaining portion of the fraud charge against the attorney was dismissed upon the finding that: "Despite allegations that false statements and perjured testimony were introduced by Berglas, no proof whatsoever of these charges has been adduced."{21} Not only were the charges against Berglas wholly unfounded and vicious, they forced Smith Barney to incur additional legal expenses because it had to engage outside counsel to represent it in this action to avoid a conflict of interest claim.

Evidence of bad faith is heightened by the fact that during the entire course of the litigation, despite the serious charges [663] leveled against the attorney and the co-defendants, plaintiff's counsel never noticed the deposition of any of the defendants or any purported witness.{22} There was not even a "meandering" through the pre-trial procedure.{23}

Entirely apart from the finding of bad faith, which warrants the assessment of legal costs against the litigants and their attorney, there is sufficient evidence to impose sanctions against the attorney for acts and conduct that transgress both Rule 11 and section 1927 of Title 28. He repeatedly failed to attend sessions on time, necessitating delays and wasting the time of opposing attorneys; he failed to adhere to stipulations; he made frivolous motions seeking reargument of decided motions; and

he sought to avoid determination of the merits of pending motions made by the defendants. Some idea of the obstructive tactics employed by plaintiffs' counsel may be garnered by a motion he made to transfer the action to the District of New Jersey under 28 U.S.C. Sec. 1404, on the "eve of a hearing on defendants' motion to dismiss various causes of action which defendants made almost two months ago."{24} Indeed, this Court observed it was the first time in its "experience where plaintiff commenced an action in a district and thereafter moved to transfer the action to another district, his home district."{25} The motion was denied and plaintiffs' motion for leave to serve an amended complaint was granted, but because of plaintiffs' obstructive conduct, such leave was conditioned upon payment of $250 (which, up to the time the instant motion was heard, had not been paid).

Measured by any standard, the conclusion is compelled that this action, from beginning to end, was "simply for the sake of burdening an opponent with unnecessary expenditures of time and effort [and] clearly warrants recompense for the ... outlays attributable thereto."{26} The legal fees and costs sought should be assessed against both the litigants and their attorneys.

The defendants state that the total legal fees incurred for the defense of this suit from its inception to conclusion was $49,235.75, representing 595.90 hours, of which 188.75 was time of partners and 407.15 was associates' time; and that the disbursements totalled $2,327.45. Even considering current escalating charges for professional services and hourly rates for partners and associates, by any proper standard the sum expended by defendants for resisting plaintiffs' claim is as ex-

cessive as plaintiffs' charges against the defendants were ill founded. This Court is familiar with the nature of the services rendered, and the professional skill required, and has some idea of the time required{27} to protect the interests of the defendants against plaintiffs' unjustified lawsuit. The case did not go to trial, but involved a series of motions which required time for research, preparation of briefs, and appearances in court. Undoubtedly, the legal costs incurred were increased by the obstructive tactics of plaintiffs' counsel which resulted in delays and thus imposed additional time charges, and by the need for outside counsel because the claim against Berglas disqualified him from his usual representation of Smith Barney as house counsel. The time charged and billed Smith Barney for the services rendered on the Berglas claim alone totalled

$18,976.25. Even taking into account that plaintiffs' actions forced the rendition of additional services, the fees [664] requested by defendants on this application are simply out of line. While Smith Barney, "with its rich resources may well wish to try the case expensively."{28} it may not foist its extravagances upon the unsuccessful plaintiffs.{29}

The assessment of fees against a non-prevailing litigant must be fair and reasonable based upon the particular circumstances of the case, including the financial resources and ability of the parties against whom the award is made and the financial status of the prevailing party. In sum, the equities of the situation are to be considered to assure that although the purpose of discouraging bad faith, vexatious suits is enforced, a losing party is not subjected to financial ruin.{30}

The Court is of the view, taking into account all the appropriate circumstances and facts, that a fair and reasonable fee, including the disbursements for the services required in defending against this bad faith and vexatious lawsuit is the sum of $10,000, to be assessed against plaintiff Anthony W. Tedeschi, in the sum of $4,000, against Lois Tedeschi in the sum of $1,000, and against their attorney, Merrill J. Chapman, in the sum of $5,000.

Submit order in accordance with the foregoing.

FOOTNOTES

(1)
Leave was granted to serve an amended complaint.

(2)
548 F. Supp. 1172 (Oct. 12, 1982) (plaintiffs' claims of malicious prosecution, abuse of process and infliction of emotional, mental and psychic distress not actionable; statement by defendants' attorney to arbitration panel that a third-party complaint had been filed against a former employee in a related action also not actionable); 95 F.R.D. 182 (Aug. 18, 1982) (in view of defendants' pending motions to dismiss five of six causes of action and for partial summary judgment as to remaining cause, plaintiffs were not authorized under Rule 41(a)(1)(i), Fed. R. Civ. P., to enter unilateral voluntary dismissal dismissing balance of claim of fraud by attorney upon arbitration panel).

(3)
The Rule was amended effective August 1, 1983, subsequent to the date of this motion. Prior to the amendment the Rule provided that the signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. "If . . . signed with intent to defeat the purpose of this Rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a violation of this Rule an attorney may be subjected to appropriate disciplinary proceeding."

The 1983 amendments to the rule were "intended to reduce the reluctance of courts to impose sanctions, by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions." Fed. R. Civ. P. 11 advisory committee note (cites omitted). The amendment provides:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The amendments are not applicable to this motion, but in large part merely emphasize or make explicit authority the Court had under the previous rule and under its equity powers. See Fed. R. Civ. P. 11 advisory committee notes.

(4)
Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 258-59 (1975), citing F. D. Rich Co., 417 U.S. 116, 129 (1974), Vaughan v. Atkinson, 369 U.S. 527 (1960). See also Roadway Express Inc. v. Piper, 447 U.S. 752, 765-66 (1980) (American Rule does not apply when opposing party acted in bad faith); Browning Debenture Holders' Committee v. DASA Corp., 550 F.2d 1078, 1087 (2d Cir. (1977).

(5) Nemeroff v. Abelson, 704 F.2d 652, 654 (2d Cir. 1983).

(6) White v. New Hampshire Dept. of Employment Security, 455 U.S. 445 (1982).

(7) See Obin v. District No. 9 of Int'l Ass'n of Machinists and Aerospace Workers, 651 F.2d 574 (8th Cir. 1981)

(8) White, supra note 6, at 451.

(9) Supra note 4, at 259 n. 31.

(10) See Harradine v. Board of Supervisors, 73 A.D. 2d 118, 425 N.Y.S. 2d 182, (4th Dep't 1980).

(11) Browning Debenture Holders' Committee, supra note 4, at 1088.

(12) Roadway Express Inc., supra note 4, at 766 (1982); Hall v. Cole, 412 U.S. 1, 15 (1973); Browning Debenture Holders' Committee, supra note 4, at 1088.

(13) Hall v. Cole, supra note 12, at 4.

(14) Roadway Express Inc., supra note 4, at 766.

(15) Nemeroff v. Abelson, 620 F.2d 339, 350 (2d Cir. 1980); see also Miller v. Schweikert, 413 F. Supp. 1059 (S.D.N.Y. 1976).

(16) Colucci v. New York Times Co., 533 F. Supp. 1011, 1013 (S.D.N.Y. 1982).

(17) In fact, the claim was dismissed because it was barred by the statute of limitations.

(18) Nemeroff, supra note 15, at 348.

(19) New York Judiciary Law § 487:

§ 487. MISCONDUCT BY ATTORNEYS

An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,

2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

(20) Tedeschi, supra note 2, 548 F. Supp. at 1175-76 (emphasis added, footnotes deleted.)

(21) Tedeschi v. Smith Barney, Harris Upham & Co., 81 Civ. 6938, Memorandum Opinion, (S.D.N.Y. March 23, 1983).

(22) See Nemeroff, supra note 5, at 660.

(23) Id.

(24) Tedeschi v. Smith Barney, Harris Upham & Co., 81 Civ. 6938, Memorandum Opinion (S.D.N.Y. April 20, 1982).

(25) Id.

(26)
Lipsig v. National Student Marketing Corp., 663 F.2d 178, 181 (D.C. Cir. 1980).

(27)
Boe v. Colello, 447 F. Supp. 607, 610 (S.D.N.Y. 1978); Blank v. Talley Indus., Inc., 390 F. Supp. 1, 4 (S.D.N.Y. 1975).

(28)
Farmer v. Arabian American Oil Co., 285 F.2d 720, 722 (2d Cir. 1960).

(29)
Farmer v. Arabian American Oil Co., 31 F.R.D. 191 (S.D.N.Y. 1962), rev'd, 324 F.2d 359 (2d Cir. 1963), rev'd, 379 U.S. 227 (1964).

(30)
Colucci, supra, note 16, at 1012-13. See also Cohen v. West Haven Board of Police Commissioners, 638 F.2d 496.505 (2d Cir. 1980); Faraci v. Hickey-Freeman Co., 607 F.2d 1025, 1028 (2d Cir. 1979).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 853 — August Term, 1984

(Argued: March 1, 1985 Decided: March 6, 1985)

Docket No. 84-7730

ANTHONY W. TEDESCHI and LOIS TEDESCHI,
Plaintiffs,

MERRILL J. CHAPMAN,
Appellant,

—against—

SMITH BARNEY, HARRIS UPMAN & CO., INC., MARTIN S. BERGLAS and JOHN MAINE,
Defendants-Appellees.

Before:

KAUFMAN, MESKILL and NEWMAN, *Circuit Judges.*

Attorney for unsuccessful plaintiffs below appeals from a judgment of the United States District Court for the Southern District of New York (Edward Weinfeld, *District Judge*), assessing costs and fees against him in the total amount of $5,000.

Affirmed.

MERRILL J. CHAPMAN, New York, New York, *pro se.*

HOWARD I. RHINE, New York, NY (Kramer, Coleman & Rhine, New York, N.Y., A. David Stern, of counsel) *for Defendants-Appellees.*

PER CURIAM:

Anthony and Lois Tedeschi brought the action underlying this appeal in the district court for the Southern District of New York, seeking to recover damages from Anthony Tedeschi's ex-employer for malicious prosecution, abuse of process, defamation, fraud and emotional distress. All five of the Tedeschis' claims were dismissed prior to trial, *see* 548 F. Supp. 1172 (S.D.N.Y. 1982). Thereafter, the successful defendants moved, pursuant to Fed. R. Civ. P. 11, 28 U.S.C. § 1927 (1982) and the inherent equitable powers of the Court, for an award of attorneys' fees and costs. In a thorough and thoughtful opinion, *see* 579 F. Supp. 657 (S.D.N.Y. 1984), Judge Weinfeld granted the motion, and ordered Mr. Tedeschi to pay the defendants $4,000, Mrs. Tedeschi to pay $1,000 and Merrill J. Chapman, their attorney, to pay $5,000. Though the clients paid the fees assessed against them, their attorney appeals the assessment against himself.

We have carefully considered the arguments advanced on appeal, and find them to be wholly without merit. We do not believe the district court was without jurisdiction to grant the motion for costs and fees. Neither do we believe that the court exceeded its discretion in awarding the sum of $5,000. On the contrary, it appears that Judge Weinfeld was eminently reasonable in assessing that amount.

Under the "American Rule," courts are indeed reluctant to award attorneys' fees pursuant to their inherent

equitable powers, and have limited such awards to cases where the unsuccessful party is found to be acting in bad faith. *See Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 765-66 (1980); *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 258-59 (1975); *Browning Debenture Holders' Comm.* v. *DASA Corp.*, 560 F.2d 1078, 1087 (2d Cir. 1977); *Nemeroff* v. *Abelson*, 704 F.2d 652 (2d Cir. 1983). Judge Weinfeld, who witnessed the tortuous proceedings underlying this appeal, found that the claims were brought in bad faith, and the record provides ample support for his finding.

Accordingly, for substantially the reasons set forth in Judge Weinfeld's opinion below, the judgment of the district court is affirmed. Pursuant to Fed. R. Civ. P. 38, we assess double costs and damages of $1,500. against Chapman for taking a frivolous appeal.

APPENDIX "B"

1. REPORT, Committee on Federal Courts, Association of the Bar of the City of New York.

2. Legislative History, 28 U.S.C. 1927. H. R. Conf. Report No. 1234, 96th Cong., 2d Sess. 8, reprinted in 1980 U.S. Code, Congressional & Administrative News 2781, 2782-83.

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Procedural Rights of Attorneys Facing Sanctions

By The Committee on Federal Courts

Introduction

The imposition of disciplinary sanctions on attorneys practicing in the federal courts has become an increasingly used, if controversial, phenomenon. A number of court decisions have indicated an increasing willingness to use existing powers to impose sanctions against the making of frivolous claims or the pursuit of dilatory litigation tactics. The recent amendments to the Federal Rules of Civil Procedure now mandate the imposition of sanctions in a number of circumstances and considerably expand the number of situations in which the imposition of sanctions is expressly authorized.

In the face of this rapid expansion of the authority for and use of sanctions, there has been relatively little consideration given to the procedural guarantees which must accompany the imposition of sanctions. Indeed, the recent amendments to the Rules largely ignore the procedural due process issues raised by the imposition of sanctions, and the Advisory Committee Notes contain language which betrays a minimalist approach to these procedures.[1]

Of most immediate concern, a number of recent court decisions appear to have imposed sanctions on attorneys without providing for notice and opportunity to be heard and without even discussing the serious due process issues and related concerns of fundamental fairness raised thereby. In recent years, the United States Courts of Appeals for the Second Circuit has fallen into this practice.[2] In our view, these decisions impermissibly ignore existing Supreme Court precedent[3] and fail to afford fundamental procedural rights to the individual attorneys involved.

It is imperative, in our view, that Bench and Bar undertake a prompt and searching inquiry into the procedural safeguards which must be observed prior to the imposition of sanctions. Obviously, sanctions have far-reaching effects on both attorneys and their clients. The imposition of attorneys' fees may approximate or even exceed the amount in controversy. Equally important, the imposition of sanctions against an attorney can have severe collateral consequences to an attorney's professional future.[4] A finding of professional misconduct may result in a subsequent disciplinary proceeding being brought against the attorney. It is likely to be considered in connection with any application for admission to the Bar of another court[5] or to membership in professional groups and, almost certainly, if he is a candidate for public or judicial office. Most significantly, the threat of sanctions may temper his zeal in effectively representing his client.[6]

This Report focuses upon the procedural safeguards which the Committee believes should be required before a federal trial or appellate court may impose sanctions on attorneys. The Committee has concluded that traditional requirements of notice and opportunity to be heard must be observed and that, while written submissions may be sufficient in the ordinary case, disputed issues of material fact require an evidentiary hearing.

I. *Authority for Imposition of Sanctions and the 1983 Amendments to the Federal Rules of Civil Procedure.*

The power of a court to impose sanctions rests upon either explicit statutory authority or the court's inherent powers, said to be "those [powers] which 'are necessary to the exercise of all others.' " *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 764 (1980) (*quoting United States v. Hudson,* 7 Cranch 32, 34 (1812)). Sanctions may be imposed at the pretrial stage, during the trial itself and during the appellate proceedings. The Federal Rules of Civil Procedure, for many years, have authorized sanctions

against both attorneys and parties for various failures to comply with pretrial motions and orders,[7] sanctions that range from an award of expenses resulting from the misconduct (Fed. R. Civ. P. 37(a) (4)) to dismissal of the action on its merits (Fed. R. Civ. P. 37(b) (2) (C), 41(b)). The Rules authorized the imposition of sanctions as "part of the court's responsibility for securing the system's effective operation."[8] The 1983 amendments to the Rules now prescribe sanctions for (a) violation of the certification requirement imposed by Rule 11 for pleadings, motions, and other papers, (b) failure to comply with a scheduling or pretrial order, (c) failure to appear at or be prepared to participate in a pretrial conference pursuant to Rule 16, and (d) violation of the certification requirement imposed by Rule 26 for discovery requests, responses and objections. In addition, the court is empowered to impose sanctions under the federal contempt statute (18 U.S.C. §401(2) (1966)). As to appeals, damages for delay may be assessed if an appeal is frivolous, Fed. R. App. P. 38, or a lawyer otherwise multiplies the court proceedings unreasonably or vexatiously (28 U.S.C. §1927 (Supp. 1983)). Finally, a litigant or lawyer may be sanctioned under the court's inherent powers, *Roadway Express, Inc. v. Piper, supra,* and under local rules of the district and appellate courts promulgated pursuant to Fed. R. Civ. P. 83 and Fed. R. App. P. 47, respectively, and 28 U.S.C. §2071 (1982).

Little attention in the Rules has been paid to the institutional and procedural safeguards which should attend the increased reliance on, and emphasis upon, the imposition of sanctions. Many of these rules and statutes, although not all,[9] leave unaddressed the issue of the due process procedures for imposing these sanctions.

Although the Advisory Committee Notes to Rule 11 state that "[t]he procedure [for imposing sanctions] obviously must comport with due process requirements" and the Notes to Rule 26(g) contain an almost identical statement,[10] even these statements are considerably diluted by caveats in the Notes which

may be read to imply that due process requirements should be limited to a bare minimum.[11] The Notes provide little guidance as to either the format of the procedures implementing the requirements of due process or the kinds of notice or hearing required thereby; both are said to be a function of, and dependent upon, "the circumstances of the situation and the severity of the sanction under consideration."[12]

In sum, the Rules do not set forth any generally applicable mechanisms designed to safeguard procedural rights, while the Notes, if followed, contain a bias in favor of expeditious and somewhat summary proceedings.

II. *Case Law: Constitutional Requirements.*

While the case law has addressed the due process requirements of only some of the broad array of sanctions provided for in the Rules and related statutory provisions, the decisions to date indicate clearly that whenever sanctions are applied, the issue is not *whether* due process is required, but rather the *nature* and *form* of the notice and the opportunity to be heard mandated by the due process clause.

In a case involving the attorney representing a defendant accused of participation in the assassination of President Lincoln, the attorney brought an action against the presiding judge who had disbarred him in an ex parte proceeding. *Bradley v. Fisher,* 80 U.S. (13 Wall.) 646 (1872). While the Court did not rule on the validity of the disbarment proceedings, it did set forth the several rights to which an attorney would be entitled in such circumstances. The Court stated:

> [E]xcept where matters occurring in open court in presence of the judges constitute the grounds of its action, the power of the court should never be exercised without notice to the offending party of the grounds of compliant against him, and affording him ample opportunity of explanation and defense. This is a rule of natural justice, and is as applicable to cases where a proceeding is taken to reach the right of an attorney to practice his profession as

> it is when the proceeding is taken to reach his real or personal property.[13]

The court went on to explain that providing the attorney with an opportunity to be heard is likely to have the salient effect of assuring a more thorough and well-considered judicial decision by bringing to light facts and motives unknown to the court.[14]

Similarly, *In re Oliver*, 333 U.S. 257 (1948), held that a grand-jury witness cannot be summarily charged with contempt absent compliance with due process requirements. The Court held that "failure to afford petitioner a reasonable opportunity to defend himself against the charge of giving false and evasive testimony was a violation of due process at law."[15] Once again the Court noted that when sanctions are imposed,

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.[16]

While disbarment and, arguably, contempt are unusually severe sanctions, the guarantee of due process of law has never been considered merely a function of the value of the property right jeopardized.[17]

In *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), the United States Supreme Court, applying its reasoning in *Bradley*, affirmed the entitlement to notice and opportunity to be heard attendant on the assessment of attorney's fees for counsel's failure to comply with various requirements during the course of an action.[18] In a detailed discussion of the authority for, and the predicates to, the imposition of sanctions, the Court spoke in broad and sweeping terms. The Court held, *inter alia*, that both Rule 37 and the inherent powers of the federal courts authorized the imposition of sanctions by a district court personally upon an attorney.[19] However, the Court also ruled:

> Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record.[20]

Several circuits, relying upon this series of Supreme Court decisions, and in particular, *Roadway Express, Inc. v. Piper, supra,* have emphasized that a sanctioned party or attorney is entitled to traditional procedural due process safeguards. Thus, in *Miranda v. Southern Pacific Transp. Co.,* 710 F.2d 516 (9th Cir. 1983), the district court imposed sanctions of $250 on counsel for failing to comply with a local rule of the district court concerning the presentation and form of pretrial documents. The imposition of sanctions was reversed. Although the court affirmed the authority of the district court to impose a monetary sanction against counsel under the court's local rules,[21] even absent a finding of contempt,[22] it held that such authority could not be exercised without the procedural protections of prior notice, an opportunity to prepare a defense, and a separate hearing addressed to the particular issue of the imposition of sanctions.[23] The court stated:

> Absent extraordinary circumstances, procedural due process requires notice and hearing before any governmental deprivation of a significant property interest. *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971).
>
> * * *
>
> This court, in an analogous circumstance, will not impose monetary penalties or take other disciplinary actions for an attorney's failure to comply with its orders until "after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested . . . ." Fed. R. App. P. 46(c); (citation omitted). It is appropriate for the district courts to afford attorneys similar procedural protections before imposing monetary sanctions upon them.[24]

Similar due process requirements also have been held appli-

cable to sanctions imposed under 28 U.S.C. §1927 authorizing the taxing of excess costs arising from an attorney's unreasonable and vexatious conduct in multiplying proceedings.[25] *United States v. Blodgett*, 709 F.2d 608 (9th Cir. 1983), held that sanctions imposed under Section 1927 must be predicated on a hearing concerning the issue of counsel's bad faith.

> [A]s the Supreme Court made clear in *Roadway*, "sanctions . . . should not be assessed lightly or without a fair notice and an opportunity for a hearing on the record."[26] 447 U.S. at 767. Where, as here, the conduct giving rise to the imposition of sanctions occurred outside the presence of the court, counsel should be provided an opportunity to explain his conduct. *See In re Allis*, 531 F.2d 1391, 1392 (9th Cir. 1976).
>
> No such opportunity was provided in the instant case. While on the facts we cannot conclude that this district court erred in finding that the appeal was frivolous, the mere fact that an appeal is frivolous does not of itself establish bad faith. To establish bad faith on this record, a hearing was required to determine if the appeal was taken solely for purposes of delay.[27]

In fact, cases interpreting Section 1927 reflect nothing more than the express intent of Congress that sanctions imposed under this Section be preceded by due process safeguards. The House Committee Report states:

> The high standard which must be met to trigger Section 1927 insures that the provisions in no way will dampen the legitimate zeal of an attorney in representing his client.
>
> * * *
>
> The managers intend that judges applying Section 1927 will safeguard the rights of an attorney who may be held in violation of the Section. *Before sanctioning an attorney under Section 1927, the court is to afford the attorney all appropriate protection of due process available under the law.*[28]

III. *Recent Imposition of Sanctions Without Apparently Granting Procedural Safeguards.*

Given the state of the authorities, the matter of the applicability of due process to the imposition of sanctions against attorneys does not seem to be in doubt. As noted, however, courts have on occasion imposed sanctions apparently without affording to the party facing sanctions even elementary procedural rights. *See Malhiot v. Southern California Retail Clerks Union,* 735 F.2d 1133 (9th Cir. 1984) (damages, including costs and fees, awarded against counsel pursuant to Fed. R. App. P. 38 and 28 U.S.C. §1927); *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 699 F.2d 484 (9th Cir. 1983), *cert. denied,* 104 S. Ct. 1445 (1984) (damages, including costs and fees, awarded against counsel as well as losing party pursuant to Fed. R. App. P. 38 and 28 U.S.C. §1927); *United States v. Potamkin Cadillac Corp.*, 697 F.2d 491 (2d Cir.) (costs plus fees imposed on counsel under 28 U.S.C. §1912,[29] 1927), *cert. denied,* 103 S. Ct. 3128 (1983); *Muigai v. United States Immigration & Naturalization Serv.*, 682 F.2d 334 (2d Cir. 1982) (costs, damages and expense imposed on counsel as well as litigant under Fed. R. App. P. 20, 38 and 28 U.S.C. §§1912, 1927). To the extent that these cases appear to dispense with procedural safeguards, they are, in our view, wrongly decided.[30] These cases do not discuss or justify the apparent lack of notice and opportunity to be heard; and one is, by and large, left to speculate as to the procedural underpinnings of the decisions.[31]

Perhaps the most obvious rationale for dispensing with formal notice and hearing is the belief that additional procedural steps would only contribute to further delay[32] whereas the sanction itself is being imposed to discourage and avert unnecessary dilatory maneuvers or further congestion of the judicial calendar with meritless cases and frivolous appeals.[33] A "reverse twist" on this logic is exemplified by *Hanley v. Condrey,* 467 F.2d 697, 699-700 (2d Cir. 1972), in which the court found that the appeal employed "utterly specious arguments" and was

"patently frivolous," but stated that it would refrain from assessing costs under Section 1927 because to do so would encumber the judicial process with further delay. For reasons elaborated below, it does not necessarily follow that providing notice and a hearing need involve substantial delay. Courts have long been able to tailor the form of due process procedures to the circumstances involved.

A second explanation underlying these cases is the human reaction of judges impatient with what they perceive as the intentional practice of lawyers in delaying the final day of judgment.[34] This frustration on the part of judges, however, is itself a compelling reason to extend due process safeguards whenever sanctions are imposed: to the extent that personal prejudices and emotions of a judge or the institutional biases of a court are permitted to enter into the sanctioning process, due process procedures serve both to mitigate the harshness of the sanction where inappropriate to the circumstances and to provide a "cooling-off" period and time for reasoned reflection. Moreover, expedience and efficiency have never been said to justify dispensing with constitutional requirements. *Fuentes v. Shevin*, 407 U.S. 67, 90 (1972); *Link v. Wabash RR*, 370 U.S. 626, 648-49 (1962) (Black, J., dissenting).

Finally, it is possible that attorneys have been sanctioned without procedural safeguards for the reason that some courts do not deem such safeguards to be required when it is clear to the Court from the record that sanctions are appropriate.[35] However, even in this instance, in the analogous case of a contempt proceeding, a summary imposition of a sanction is not justified absent an extreme need for immediate action. Under the federal contempt statutes, 18 U.S.C. §401 (1966) and Fed. R. Crim. P. 42, a summary finding of contempt is permissible only when the conduct being punished occurs in open court and in the immediate view of the judge and the contempt finding is necessary to protect the dignity of the court.[36] The rationale for the exercise of this extraordinary

power is that (1) since the judge is personally aware of the facts, there may be no need for a hearing; and (2) punishment without delay is necessary to vindicate the court's authority or to prevent obstructions of justice. In the context of imposing disciplinary sanction under the Federal Rules and related civil statutes, it is unlikely that either justification is present: the court is not facing an immediate threat to its dignity; and the requisite finding of willful or unreasonable behavior rests in part in the mind of the client or attorney and is only partially exposed in the papers filed with the court.[37]

In sum, the cases that have discussed due process require that the sanctioning process must be such as to afford due process rights. What remains to be discussed is the actual procedure for implementing these due process rights, i.e., the form and scope of the procedural safeguards discussed above.

IV. *Form and Scope of Due Process Safeguards.*

Once it has been determined that due process applies, the question that remains is "what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).[38]

In our view, there is no reason why an attorney facing sanctions should not have a meaningful opportunity to defend himself without clogging the judicial process. At times, simply providing for notice, a minimum amount of time to prepare an oral response and a hearing in the judge's chambers may be sufficient,[39] although in the usual case it is difficult to perceive why time for preparing a written response should not be permitted. At other times, however, a more substantial amount of time for preparing a fuller written submission and even a full evidentiary hearing may be necessary.

The elasticity of the notice requirement is illustrated in microcosm by the decisions of the Ninth Circuit, in *In re Allis*, 531 F.2d 1391 (9th Cir.), *cert. denied*, 429 U.S. 900 (1976), and *Miranda v. Southern Pacific Transp. Co.*, 710 F.2d 516 (9th Cir. 1983). In *Allis*, a contempt case arising out of counsel's late

arrival at court, the court held that notice giving counsel ten minutes to prepare an explanation was sufficient, under the circumstances, to satisfy due process. By contrast, in *Miranda*, a majority of the Court held that counsel had been denied due process because of the inadequacy of notice, although it was clear that the District Court, before applying sanctions, had pointed out deficiencies in counsel's pretrial materials and had warned that failure to cure these deficiencies would expose the attorneys to sanctions. Rejecting the argument of the dissent that earlier warnings constituted adequate notice,[40] the majority stated:

> It is important . . . that before sanctions are imposed there be a separate hearing addressed to the particular issue of the imposition of sanctions, with notice of the rule violation charged, and an opportunity for the attorneys to respond.[41]

In any case, it is clear that at a minimum due process requires notice and an opportunity to be heard "appropriate to the nature of the case." *Goss v. Lopez*, 419 U.S. 565, 579 (1975). As the Supreme Court has stated:

> The relative weight of liberty and property interests is relevant, of course, to the form of notice and hearing required by due process [citation omitted]. But *some* form of notice and hearing—formal or informal—is required before deprivation of a property interest that 'cannot be characterized as *de minimus*.'

Fuentes v. Shevin, 407 U.S. 67, 90 n.21 (1972) (emphasis in original).[42] The scope and form of due process safeguards in the context of sanctioning attorneys, therefore, must be designed to afford an attorney an adequate and reasonable opportunity to explain and justify his conduct.

In the usual case, notice and an opportunity to be heard on a written submission should be provided; and, when the imposition of the sanction is dependent upon facts genuinely in

dispute, the court should conduct an evidentiary hearing which, in most cases, can be relatively brief. The purpose of the written submission is to ensure accuracy and fairness in the fact-finding process and meaningful appellate review as well as to enable the court to determine if a full evidentiary hearing is necessary. If the court finds that the explanation given is insufficient as a matter of law and does not affect the penalty imposed, or the court accepts the explanation offered and proceeds on that basis, no evidentiary hearing would be required. On the other hand, if there is a material fact issue, an evidentiary hearing should be held.[43]

Any evidentiary hearing should focus first on the requisite elements that have allegedly been violated by the attorney facing sanctions. In many cases, the Rules and statutes require a preliminary finding that the attorney's misconduct either was willful or substantially justified the imposition of an appropriate sanction. The failure to afford such a hearing in the face of a genuine factual issue as to these elements constitutes reversible error.[44] In other cases, such as those involving the duty of reasonable inquiry under Rule 11, the inquiry necessarily embraces matters dehors the record.[45]

The same procedural results should be reached when a court contemplates the visitation of fees pursuant to 28 U.S.C. §1927. By its terms, Section 1927 requires a preliminary finding that the action is commenced for reasons of harassment or delay or for other improper purposes.[46] It follows, therefore, that in order to make a finding that the action was meritless and commenced in bad faith, the attorney is entitled to a hearing, and to present evidence of good faith, at least where the written submissions reveal a genuine issue of fact.[47]

Apart from the need to establish an appropriate factual predicate for sanctions, there are a number of practical considerations which argue strongly that there be a separate proceeding, however brief, addressed to the particular issue of the imposition of sanctions.

First, an attorney who believes that he is arguing his client's case will be bound by various professional constraints and tactical considerations that would not apply if he were arguing on his own behalf. An attorney is bound by professional ethics to represent his client zealously within the bounds of the law, to preserve the confidences and secrets of his client and to exercise his independent professional judgment on behalf of his client.[48] As such, the lawyer may respond only with the best interests and rights of his client in mind when the court questions the attorney as to various matters in the case and must preserve client confidences in doing so. When the lawyer is advised that the court is contemplating imposing sanctions upon him, his response to the same inquiry or questions can be addressed free of any overriding concern for confidentiality of client communications.[49] As an example, a lawyer may have based his conduct on facts given to him by a client or a third party, either erroneously or falsely. The communication might be privileged or perhaps should not be revealed for tactical reasons. If, however, the attorney is personally facing sanctions and has been provided with notice and opportunity to be heard, he will be in a position to reveal the information upon which he based his conduct or to indicate the privileged nature thereof[50] and thereby justify his conduct.

Second, the interests of an attorney or his client may be at times antagonistic, especially when the court is considering not only the proper apportionment of the sanction, but also the appropriate sanction to be imposed. From the viewpoint of the client, dismissal of the case is the most severe sanction whereas an assessment of fees is considered the most lenient. From the viewpoint of the attorney, however, a substantial pecuniary sanction may toll more heavily on him personally than dismissal of the case. An additional proceeding dealing with sanctions enables the court to more accurately allocate the imposition of sanctions between an attorney and his client based upon their culpability.[51]

Third, an attorney who is unable to justify his conduct should have an opportunity to persuade the court to mitigate the severity of the sanction to be imposed. *See Miranda v. Southern Pacific Transp. Co., supra,* 710 F.2d at 522-23 (a hearing provides the court with ample "time to consider the severity and propriety of the proposed sanction in light of the attorneys' explanation for their conduct").

Fourth, even where the issue is not factual but "legal," i.e., the focus is on the alleged frivolousness of an attorney's legal argument, it may be appropriate to afford the attorney an opportunity to submit a brief supporting his *bona fide* belief that the legal sufficiency of the claim was supported by a lack of clarity in the law,[52] or to present, by way of affidavit, the opinion of a second attorney expert in that area of the law. If the matter arises in an appellate court, the court could determine whether to place the separate proceeding on its own calendar or remand the case for further consideration.[53]

Fifth, procedural safeguards can also serve as a buffer between the human or institutional reactions of a judge and the posture of neutrality appropriate to a court. The delay provided by notice and opportunity to be heard, and an evidentiary hearing if required, may serve to restore an atmosphere of impartiality. In that connection, the court should be required to make specific findings of fact in order to enhance effective and meaningful appellate review of the trial court's decision.[54]

In certain cases, such as discovery disputes regulated by Fed. R. Civ. P. 37(a) (2), attorneys fees and expenses are automatically imposed on a party, his attorney or both, unless the court finds that the conduct initially invoking the sanction was substantially justified. In such instances, no formal notice would be necessary, since the Rules themselves provide notice that sanctions are at issue. However, once a decision is made on the merits of a discovery dispute, if the Court is considering assessing fees against the attorney, it should provide an opportunity for the attorney to justify his conduct.[55]

Some commentators have suggested that a hearing may be unnecessary when the judge is already sufficiently aware of the facts mandating the imposition of sanctions.[56] We agree that a hearing need not be held simply to repeat facts already of record; and even if a hearing is otherwise required, facts already of record need not be repeated. However, to the extent that some suggestions may go further and are meant to obviate the need for notice of the alleged offense and the specific matters asserted as grounds therefor or the need for a full opportunity to be heard, we disagree. Any such suggestion necessarily would assume that the judge has accurately perceived what has transpired before him, and that he has reviewed all relevant facts necessary to make a finding that sanctions should be imposed. As noted above, there are factors relevant to a finding that sanctions should be imposed that ordinarily will not have been addressed four-square in the record, and there are other factors that normally must be established dehors the record. In addition, one of the elementary purposes of due process is to insure that justice not only is done but appears to be done—while the court may indeed be satisfied that it knows a violation of the Rules or statutes when it sees it, the right of a person facing sanctions to participate and to add to the court's store of information continues to be essential to assure accuracy and both the reality and appearance of fairness whenever sanctions are imposed.

V. *Conclusion.*

Precedent and policy require the use of due process safeguards whenever sanctions are imposed. Since sanctions may involve serious consequences, simple justice requires that basic procedural safeguards be observed. Even apart from the evident need to be fair to attorneys who face sanctions, we believe that strict adherence to such safeguards will in fact complement rather than frustrate the legitimate goals which are served by

the availability and use of sanctions. Sanctions will best serve their intended purpose of promoting the orderly and economical processing of lawsuits if they are applied in a predictable and even-handed manner. To the extent that sanctions are applied in a manner which is perceived as arbitrary or uncertain, they are likely to breed satellite litigation and to create an antagonism between court and counsel which can only detract from goals of economy and efficiency. Scrupulous adherence to procedural safeguards should minimize these problems and therefore, in the final analysis, should enhance the acceptability and utility of those sanctions which are appropriately applied.

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FOOTNOTES

[1] The Notes to Fed. R. Civ. P. 11 state that the "efficiencies achieved through more effective operation of the [new] pleading regimen [should] not be offset by the cost of satellite litigation over the imposition of sanctions" and that "the court must to the extent possible limit the scope of sanction proceedings to the record."

[2] *See United States v. Potamkin Cadillac Corp.*, 697 F.2d 491 (2d Cir.), *cert. denied*

103 S.Ct. 3128 (1983); *Muigai v. United States Immigration & Naturalization Serv.*, 682 F.2d 334 (2d Cir. 1982). These decisions may be contrasted with an earlier unreported *per curiam* decision, in which the Court vacated a district court judgment assessing fees and costs against a law firm for bringing on a frivolous motion to disqualify opposing counsel. The Court found that although the law firm had adequate notice, it was denied a separate hearing on the issue of sanctions. The Court stated that, in initially affirming the judgment, it may have concluded too readily that the arguments as to sanctions "would closely parallel" those on the motion to disqualify and that it recognized that the professional reputation of the law firm could be impacted. Accordingly, "in a possible excess of caution" the Court of Appeals granted rehearing, withdrew its prior affirmance and remanded to the district court for an evidentiary hearing to be followed by possible additional findings of fact and conclusions of law as to the sanctions issue. *North American Foreign Trading Corp. v. Zale*, (2d Cir., March 6, 1980) (per curiam). *See also United States Freight Co. v. Penn Central Transp. Co.*, 716 F.2d 954, 955 (2d Cir. 1983) (district court acted properly in protecting the plaintiff's procedural rights when it granted a default judgment for failure of defendants to comply with a discovery order "only after [defendant had] an opportunity to argue its case against the proposed sanction").

[3] *See, e.g., Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), discussed *infra*.

[4] *See Tedeschi v. Smith Barney, Harris Upham & Co.*, 579 F. Supp. 657, 661 (S.D.N.Y. 1984) ("Determination of the motion now before the Court requires a concerned and balanced judgment. If granted, it imposes sanctions upon both the unsuccessful litigants and their lawyer, but more important, in the case of the lawyer it carries with it condemnation of his professional conduct.").

[5] *See, e.g., in re Admission of Brose*, 51 U.S.L.W. 3898, 3899 (June 20, 1983), in which Chief Justice Burger dissented from the Court's grant of admission to the Bar because he found the conduct of an attorney who had been sanctioned to have been "prejudicial to the administration of justice."

[6] *See Piljan v. Michigan Dep't of Social Services*, 585 F. Supp. 1579, 1583 (E.D. Mich. 1984) ("care must be taken in assessing fees under [28 U.S.C. § 1927] less attorneys be deterred from their duty to 'represent [a] client zealously.' "); *Colucci v. New York Times Co.*, 533 F. Supp. 1011, 1014 (S.D.N.Y. 1982) ("The power to assess the fees against an attorney should be exercised with restraint lest the prospect thereof chill the ardor of proper and forceful advocacy on behalf of his client.").

[7] *E.g.*, Fed. R. Civ. P. 37 (a) (4) (award of expenses of motion); 37(b) (sanctions for failure to comply with order); 37(c) (expenses of failure to admit); 37(d) (sanctions attendant to failure to attend deposition, serve answers to interrogatories or respond to requests for inspection); 37(g) (sanctions for failure to participate in the framing of a discovery plan).

[8] *See* Fed. R. Civ. P. 11 advisory committee notes. The Advisory Committee Notes of the 1983 amendments to the Federal Rules of Civil Procedure are hereinafter referred to as the "Notes."

[9] *See, e.g.*, Fed. R. App. P. 46(c) (emphasis added) ("A court of appeals may, *after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested,* take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court."); Fed. R. Civ. P. 37(g) (emphasis added) ("If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, *after opportunity of hearing,* require such party or his attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.").

[10] Fed. R. Civ. P. 26(g) Notes. ("The sanctioning process must comport with due process requirements.").

[11] Indeed, the Notes pointedly suggest that little by way of inquiry or discovery is likely to be necessary:

> "In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.
>
> "To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record. Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances."

Fed. R. Civ. P. 11 Notes. For a criticism of the Notes as concerns the explication of judicial authority for the imposition of sanctions, see Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 Hofstra L. Rev. 997 (1983).

[12] Fed. R. Civ. P. 11 Notes.

[13] *Bradley v. Fisher*, 80 U.S. (13 Wall.) 646, 651-52 (1872).

[14] *Id.*

[15] *In re Oliver*, 333 U.S. 257, 273 (1948).

[16] *Id.*

[17] *Miranda v. Southern Pacific Transp. Co.*, 710 F.2d 516, 522 (9th Cir 1983) ("Although the financial repercussions of disbarment may be considerably more severe than the imposition of a $250 sanction, the requirements of procedural due process apply to deprivations of property worth far less.").

[18] The attorney's misconduct included a late response to interrogatories, nonappearance at depositions, and failure to respond to a court request ordering the attorneys for both sides to file briefs evaluating the impact of a recent decision in a related case. 447 U.S. at 754-56. In addition to the assessment of $17,000 in costs and fees, the district court, upon motion of the defendants, dismissed the action with prejudice.

[19] 447 U.S. at 763-67. The district court based its assessment of attorney's fees on the supposed confluence of the civil rights statutes under which the suit was commenced that permits the award of attorney's fees as part of the "costs of litigation" and 28 U.S.C. § 1927 which authorizes the imposition of "excess costs" caused by an attorney's vexatious multiplication of the proceedings. The Court rejected this argument as inconsistent with the statutory history and intent of both statutes. 447 U.S. at 759-63.

[20] *Id.* at 767.

[21] *Accord In re Sutter*, 543 F.2d 1030 (2d Cir. 1976).

[22] *But see Gamble v. Pope & Talbot, Inc.*, 307 F.2d 729, 731-33 (3rd Cir.), *cert. denied*, 371 U.S. 888 (1962) (reasoning that a monetary sanction actually constitutes a criminal penalty, the court held that the Federal Rules do not authorize the imposition of such sanction unless the attorneys are held in contempt under 18 U.S.C. § 401). As in *Miranda*, most circuits have rejected the *Gamble* holding. *See Martinez v. Thrifty Drug and Discount Co.*, 593 F.2d 992, 993-94 (10th Cir. 1979); *In re Sutter*, 543 F.2d 1030, 1036-38 (2d Cir. 1976); *Flaska v. Little River Marine Constr. Co.*, 389 F.2d 885, 868 (5th Cir.), *cert. denied*, 392 U.S. 928 (1968). *See also Roadway Express, Inc. v. Piper, supra*, 447 U.S. at 766 n.12 (citing with approval the dissenting opinion in *Gamble*).

[23] *Miranda v. Southern Pacific Transp. Co.*, 710 F.2d 516, 522, 523 n.12 (9th Cir. 1983).

[24] *Id.* at 522. *Accord In re Cardova Gonzalez*, 726 F.2d 16, 20 (1st Cir.) (district court's imposition of sanctions is appropriate only if the attorney was "given fair notice and a hearing on the record"), *cert. denied*, 104 S. Ct. 2154 (1984); *Gamble v. Pope & Talbot, Inc.*, 307 F.2d 729, 731 (3d Cir.), *cert. denied*, 371 U.S. 888 (1962) (monetary sanctions against lawyers without affording them procedural safeguards violates due process). *See also Glass v. Pfeffer*, 657 F.2d 252, 258 (10th Cir. 1981) ("trial court may assess attorneys' fees against plaintiffs' counsel personally, if it gives him the requisite notice and hearing and finds the requirements set forth in *Roadway* are met in this case."), *disapproved on other grounds, White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445 (1981).

[25] 28 U.S.C. § 1927 (Supp. 1983) now reads as follows:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Compare 28 U.S.C. § 1912 (1966) ("Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."). *See also* Fed. R. App. P. 46(c) (disciplinary sanctions may be imposed by a court of appeals for behavior unbecoming a member of the bar and for violation of the rules of the appellate court).

[26] This statement in *Roadway Express* referred to sanctions imposed under the court's inherent powers. Thus, the *Blodgett* court extended the Supreme Court's cautionary advisement to sanctions imposed pursuant to statutory authority, an issue not directly addressed in *Roadway*.

[27] *United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir. 1983). *Accord Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223, 227 (7th Cir. 1984) (before assessing attorneys' fees under section 1927, "a court should provide counsel with some opportunity to be heard"); *Barnd v. City of Tacoma*, 664 F.2d 1339 (9th Cir. 1982) (imposition of sanctions pursuant to 28 U.S.C. § 1927 requires a specific finding of intent, recklessness or bad faith); *Miles v. Dickson*, 387 F.2d 716, 717 (5th Cir. 1967) (per curiam) (stating in dictum, "[t]o assess the costs against the attorneys [under § 1927] without notice and a hearing was, of course, wrong."); *see also Hanley v. Condrey*, 467 F.2d 697 (2d Cir. 1972) (per curiam) (reserving question of whether imposition of costs pursuant to § 1927 requires notice and hearing).

[28] H.R. Conf. Rep. No. 1234, 96th Cong., 2d Sess. 8, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2781, 2782-83 (emphasis added). As a means of more effectively deterring delay, Congress originally contemplated amending Section 1927 to require a court to "warn attorneys in anticipation of a violation of section 1927 rather than simply waiting for violations to occur and imposing the sanctions provided. However, the managers decided not to require a warning as a matter of law because a violation might not necessarily be committed in the presence of a judge and because such a requirement might be viewed as license to engage in dilatory conduct until such warning is given. Such a requirement would thus have had a counterproductive effect." *Id.* at 2782.

[29] 28 U.S.C. §1912 permits an appellate court, when affirming an appeal, to award in its discretion damages for delay and single or double costs. The statute is thus similar to Fed. R. App. P. 38, which deals with frivolous appeals. Neither the

statute nor Rule 38 provides explicitly for an assessment to be levied against counsel, and we think it significant that the cases cited in the text rely on 28 U.S.C. § 1927 when the sanction is imposed on counsel.

[30] Irrespective of whether the award of double costs or damages against a party under Fed. R. App. P. 38 or 28 U.S.C. § 1912 requires notice and a hearing, it is clear that such an award, when made against an attorney, cannot be viewed as a normal incident of the appellate process but is a professional sanction requiring a showing of unreasonable and vexatious conduct.

[31] One commentator has observed: "A giant step separates imposing financial sanctions upon lawyers from doing so in the absence of any procedural safeguards and it is appropriate to question the propriety of taking that step before the frequency with which it has been done becomes a justification for continuing to do so." Note, *Financial Penalties Imposed Directly Against Attorneys in Litigation Without Resort to the Contempt Power*, 26 U.C.L.A. L. Rev. 855 (1979). *See also id.* at 876 & n.136 (discussing manner in which summary assessment cases have become authority for each other).

[32] *See also* Fed. R. Civ. P. 11 Notes quoted at n. 1, 11, *supra*.

[33] Sanctions are frequently perceived as a means of punishment so as to deter similar conduct by others. For example, in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (per curiam), the Court criticized the traditional learning that an initial warning, rather than punishment, is normally sufficient to insure compliance. The Court explained:

> [T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals [in reversing the district court's outright dismissal of the case for failure to comply with a discovery order] remained undisturbed in this case, it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.

To the extent that disciplinary sanctions no longer serve a remedial purpose designed to compensate or coerce compliance, but are instead, designed to vindicate the authority of the court and become punitive in nature, the sanction takes on more of the character of a penal proceeding and all the more implicates the various safeguards attendant thereto. *See Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911). *See generally* Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 Harv. L. Rev. 1033 (1978).

[34] *E.g., Overmyer v. Fidelity and Deposit Co.*, 554 F.2d 539, 543 n.4 (2d Cir. 1977) ("We will not countenance attempts to pervert the federal judicial process into a Dickensian court where lawsuits never end."); *Ballenilla-Gonzales v. INS*, 546 F.2d 515, 521 (2d Cir. 1976) ("Our government should not be forced to tolerate the practice of using the federal courts in a seemingly endless series of meritless or dilatory tactics designed to stall the[ir] departure [of aliens] as long as possible."), *cert. denied*, 434 U.S. 819 (1977); *SCM Societa Commerciale v. Industrial & Commercial Research Corp.*, 72 F.R.D. 110, 112 (N.D. Tex. 1976) ("Apparently my prior policy, which included a reluctance to use Rule 37 sanctions, has not worked. Henceforth, I will embark on a different course liberally using the full range of Rule 37 sanctions in appropriate circumstances.").

[35] At least one case might be cited for the proposition that when an attorney is aware of his misconduct and offers no reasonable justification therefor, sanctions may be imposed without notice or an opportunity to be heard. Over the dissent of Justice Black, the Court, in a 4-3 decision, upheld a dismissal under Fed. R. Civ. P. 41(b) and the Court's inherent powers for counsel's unjustified failure to appear at a pretrial conference and for failure to prosecute the action.

> It is true, of course, that "the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." *Anderson National Bank v. Luckett*, 321 U.S. 233, 246 [(1944)]. But this does not mean that every order entered without notice and a preliminary adversary hearing offends due process. The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct. The circumstances here were such as to dispense with the necessity for advance notice and hearing.

Link v. Wabash R.R., 370 U.S. 626, 632 (1962). While *Link* has never been overruled, its continued viability is more theoretical than real. First, in *Link* itself the Court noted that the "availability of a corrective remedy as is provided by Federal Rules of Civil Procedure 60(b)—which authorizes the reopening of cases in which final orders have been inadvisably entered—*renders the lack of prior notice of less consequence.*" *Id.* (emphasis added). Presumably, a hearing would be held should a party avail itself of the "escape hatch provided by Rule 60(b)." *Id. See, e.g., Jackson v. Washington Monthly Co.*, 569 F.2d 119, 112-23 & n.18 (D.C. Cir. 1978). Second, *Roadway Express, supra*, makes clear that an opportunity for some form of hearing must be afforded before imposing sanctions.

[36] *See United States v. Wilson*, 421 U.S. 309, 316 (1975); *Sacher v. United States*, 343 U.S. 1, 9 (1952).

[37] *See, e.g., Miranda v. Southern Pacific Transp. Co.*, 710 F.2d 516, 522 (9th Cir. 1983) (citations omitted, emphasis added), in which the court noted,

> [S]ummary contempt proceedings are unique to criminal procedure and are reserved for exceptional circumstances where 'instant action is necessary to protect the judicial institution itself.' Otherwise, the procedural protections of Fed. R. Crim. P. 42(b), which include notice, an opportunity to respond, and a hearing, are required before a finding of contempt. *Other forms of sanctions may not be imposed without affording similar procedural protections.*

[38] *Cf. Morrissey v. Brewer, supra*, 408 U.S. at 481 ("due process is flexible and calls for such procedural protections as the particular situation demands.").

[39] *See In re Allis*, 531 F.2d 139, [illegible] Cir.), *cert. denied*, 429 U.S. 900 (1976); *Hawk v. Superior Court*, 42 Cal. App. 3d [illegible]08, 116 Cal Rptr. 713 (1974), *cert. denied*, 421 U.S. 1012 (1975).

[40] One can agree with the court of appeals without favoring an unduly formalistic approach to notice and hearing. Clearly, the warnings given to counsel could not have been directed to their later efforts at compliance; and they were never given an explicit invitation to justify their conduct.

[41] 710 F. 2d at 523 n.12.

[42] In *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), the Court held that a prejudgment garnishment of wages in the amount of $31.59 entitled the wage earner to due process protection. By contrast, in the following cases, sanctions in

the form of costs and fines in amounts many times larger than $31.59 were imposed *without* apparent procedural safeguards: *Malhiot v. Southern California Retail Clerks Union*, 735 F.2d 1133 (9th Cir. 1984) ($1,500); *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 699 F.2d 484 (9th Cir. 1983) ($1,250) *cert. denied*, 104 .S Ct. 1445 (1984); *United States v. Potamkin Cadillac Corp.*, 697 F.2d 491 (2d Cir.) (double costs plus $500 in attorney's fees), *cert. denied*, 103 S. Ct. 3128 (1983); *Muigai v. United States Immigration & Naturalization Serv.*, 682 F.2d 334 (2d Cir. 1982) (double costs and damages and expenses of $2,000 assessed jointly against petitioner and his attorney).

[43] *See Flaks v. Koegal*, 504 F.2d 702, 712 (2d Cir. 1974) ("generally a judge should not resolve factual disputes on affidavits or depositions, for then he is merely showing a preference for 'one piece of paper to another.' ").

[44] In *Textor v. Board of Regents of N. Ill. Univ.*, 711 F.2d 1387 (7th Cir. 1983), the court held that counsel was entitled to a hearing *prior* to the imposition of fees under Rule 11 and inherent power, addressed to the issue of intent, notwithstanding the district court's belief that counsel's conduct was "apparent" from the record, and that the failure to provide such a hearing was not cured by a subsequent hearing at which the burden of proving that the award was not justified was placed upon counsel. Similarly, in *Miranda v. Southern Pacific Transp. Co.*, 710 F.2d 516, 523 n.12 (9th Cir. 1983), the court reversed an award of sanctions preceded by an oral warning, stating:

> It is important . . . that before sanctions are imposed there be a separate hearing addressed to the particular issue of the imposition of sanctions, with notice of the rule violation charged, and an opportunity for the attorneys to respond.

[45] *See* Fed. R. Civ. P. 11 Notes (certification of pleadings):

> The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

See also Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575, 580 (1946) ("if the rights of parties are to be adjudicated in [a fact-finding] investigation, the usual safeguards of adversary proceedings must be observed."); *Nemeroff v. Abelson*, 620 F.2d 339, 348 (2d Cir. 1980) (footnote omitted) ("A claim is colorable . . . when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim. The question is whether a reasonable attorney could have concluded that facts supporting the claim *might be established*, not whether such facts actually *had been established*.").

[46] *E.g., Overnite Transp. Co. v. Chicago Indus. Tire Co.*, 697 F.2d 789, 794 (7th Cir. 1983); *United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir. 1982); *Browning Debenture Holders' Comm. v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977), *on remand*, 81 F.R.D. 407 (S.D.N.Y. 1978).

In holding that the imposition of attorneys' fees is permitted only where the attorney intentionally acts without a plausible basis, the Court in *Knorr Brake Corp. v. Harbil, Inc., supra*, 738 F.2d at 227, set forth the following rationale:

> Such a rule protects three important interests. First is the societal interest in encouraging free access to the courts. Second is the interest of the client in obaining legal counsel who otherwise might be chilled from taking a close case. Third is the lawyer's ethical obligation to represent his or her client zealously within the bounds of the law.

[47] 1 M. Derfner & A. Wolf, Court Awarded Attorney Fees, ¶ 4.06[2], at 4-32.1 (1984).

[48] Model Code of Professional Responsibility, Canons 4,5,7 (1980).

[49] *See id.* DR 4-101(c) (4). *Compare* ABA Model Rules of Professional Conduct, Rule 1.6(b) (2) (1983).

[50] *See* Fed. R. Civ. P. 26 Notes ("Nor does the rule require a party or an attorney to disclose privileged communications or work product in order to show that a discovery request, response, or objection is substantially justified. The provisons of Rule 26(c), including appropriate orders after *in camera* inspection by the court, remain available to protect a party claiming privilege or work product protection."). A party or attorney does not, however, know whether to employ this provision unless he has been provided with prior notice and opportunity to be heard.

[51] An additional consideration was recently illustrated in *Malhiot v. Southern California Retail Clerks Union*, 735 F.2d 1133 (9th Cir. 1984). In his dissent from the imposition of sanctions without notice or a hearing, Judge Boochever noted as follows:

> Since section 1927 requires bad faith or intentional misconduct by counsel, I think that counsel should be entitled to present any arguments that they may have as to why the sanction should not be imposed. This is particularly true in this case since two attorneys signed on the brief and there was no oral argument. It may well be that at least one of the attorneys may be able to convince us that he had no part in the misleading arguments which are really the basis for imposing the sanction, and that he did not consciously adopt those arguments. *Id.* at 1139.

[52] *See, e.g., Adams v. Carlson*, 521 F.2d 168, 170 (7th Cir. 1975); *Bradley v. School Board*, 472 F.2d 318, 320-22, 327 (4th Cir. 1972), *vacated and remanded on other grounds*, 416 U.S. 696 (1974).

[53] *See* 1 M. Derfner & A. Wolf, Court Awarded Attorney Fees, ¶ 4.06[1] at 4-32 & cases cited therein (1984) (footnotes omitted) ("A court of appeals is, of course, entitled to make an initial finding of bad faith at the appellate level, as in the case of a frivolous appeal or procedural abuse in the appeals court. The appellate court making such a finding may remand to the district court for computation of the fee, or compute the appellate fees itself."). A court of appeals may remand the case to the district court for further proceedings pursuant to 28 U.S.C. § 2106 (1982). *See also Malhiot v. Southern California Retail Clerks Union*, 735 F.2d 1133, 1138 (9th Cir. 1984) (Boochever, J., dissenting) (an appellate court should, in order to assure counsel his due process rights, issue an order to show cause why a sanction should not be imposed under §1927; *United States v. Birtle*, 521 F.2d 134 (9th Cir. 1975) (order to show cause issued before sanctioning counsel under Fed. R. App. P. 46(c)), *cert. denied*, 426 U.S. 947 (1976).

[54] *See Rothenberg v. Security Management Co.*, 736 F.2d 1470, 1472-73 (11th Cir. 1984) (where sanctions were supported by mere conclusory statements concerning plaintiffs' bad faith, imposition of sanctions against plaintiffs vacated and remanded for the district court to indicate the factual basis for its ultimate finding and to facilitate meaningful appellate review); *Miranda v. Southern Pacific Transp. Co., supra*, 710 F.2d at 522-23; *Gardner v. Southern Ry. Systems*, 675 F.2d 949 (7th Cir.

1982); *Brown v. Bullard Indep. School Dist.*, 640 F.2d 651 (5th Cir.), *cert. denied*, 454 U.S. 828 (1981); 6 Moore's Federal Practice, ¶ 54.70[5]. The importance of appellate review is illustrated by the Second Circuit's reversal of the district court's imposition of sanctions in *Cheng. v. GAF Corp.*, 713 F.2d 886 (2d Cir. 1983). In *Cheng* the court found that the plaintiff's motion to disqualify defendant's counsel was, contrary to the district court's holding, not only not frivolous or unreasonable, but that the plaintiff's attorney "may have been *ethically obligated* to pursue his disqualification efforts" in view of a prior decision of the Court of Appeals which supported disqualification. *Id.* at 891 (emphasis added). On remand, the district court granted plaintiff's motion for disqualification which was then affirmed by the Second Circuit. 747 F.2d 97 (2d Cir. 1984).

[55] Obviously, if a litigant who is sanctioned later seeks redress from his attorney, the latter will have all the rights available to any defendant in a plenary action.

[56] *See* Fed. R. Civ. P. 11 Notes ("In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary."). Judge Sofaer, a respected and learned member of the bench of the Southern District of New York, urged that the rules should "expressly authorize a summary procedure for imposing monetary sanctions." Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 St. John's L. Rev. 680, 715 (1983). In that context, Judge Sofaer argued that "[a] court should be free to alter th[e] procedure [for imposing sanctions] when the judge is personally familiar with the relevant facts. In such situations, the judge should be free to impose the sanction immediately, within the monetary limits, as long as the attorney or the party facing the sanction is given an adequate opportunity to be heard as to why the sanction should not be imposed, and as to the proper amount." *Id.*

LEGISLATIVE HISTORY
P.L. 96-349
ANTITRUST IMPROVEMENTS ACTS

Sanction For Attorney Delay

The House amendment contained no provision imposing sanctions for attorney delay. As a compromise the managers on the part of the House and the managers on the part of the Senate agreed to amend section 1927 of title 28, United States Code, in one respect--to broaden the range of increased expenses which an attorney who engages in dilatory litigation practices may be required by the judge to satisfy personally. Section 1927 currently refers to "excess costs", a phrase construed to cover only the narrow category of taxable costs, such as filing fees. The amendment agreed to by the managers expands the category of expenses the judge might require an attorney to satisfy personally to include costs, expenses, and attorneys' fees reasonably incurred because of such (dilatory)

conduct.". The managers agreed that if an attorney does violate the existing standard covering dilatory conduct, and by such conduct causes the other parties to incur expenses and fees that otherwise would not have incurred, the attorney should be required to satisfy personally this full range of excess costs attributable to such conduct.

The high standard which must be met to trigger section 1927 insures that the provision in no way will dampen the legitimate zeal of an attorney in representing his client. The amendment to section 1927 is one of several measures taken in this legislation to deter unnecessary delays in litigation. The purpose of deterring delay would be more effectively achieved if judges warn attorneys in anticipation of a violation of section 1927 rather than simply waiting for violations to occur and imposing the sanctions provided. However, the managers decided not to require a warning as a matter of law

because a violation might not necessarily be committed in the presence of the judge and because such a requirement might be viewed as a license to engage in dilatory conduct until such warning is given. Such a requirement would thus have had a counterproductive effect.

The managers intend that judges applying section 1927 will safeguard the rights of an attorney who may be held in violation of the section. Before sanctioning an attorney under section 1927, the court is to afford the attorney all appropriate protections of due process available under the law.

(page 9)

The managers on the part of the Senate agreed to recede from all other changes made to section 1927 by the Senate bill. The managers are of the opinion that litigation can be expedited if courts give greater attention to the availability of section 1927, as amended.

Supreme Court, U.S.
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No. 24(2)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

Merrill J. Chapman,

Petitioner,

v.

Smith Barney, Harris Upham & Co., Inc.,

Respondent.

- Supplemental Brief -

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. 240

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- Supplemental Brief -

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This Supplemental Brief is provided to the Court under the provisions of Rule 22.6 in order to call attention to a new case and other intervening matter not available at the time of the petitioner's last filing.

The new cases which warrant the Court's attention are: Smiga v. Dean Witter Reynolds, 2nd Circuit Slip Opinion No. 798, June 28, 1985, Rehearing Denied, September 10, 1985; Burlington Coat Factory etc v. Esprit de Corps et ano, 2nd Circuit Slip Opinion No. 957, August 6, 1985 at 5488 citing Eastway Construction Corp. v. City of New York; and Adamsons v. Wharton, 2nd Circuit Slip Opinion No. 1326, August 21, 1985.

The focus of this Supplemental Brief is the Smiga case, supra, now reported at 766 F2d 698. The instant petitioner-attorney, Merrill J. Chapman, was the attorney for Ms. Smiga and likewise sanctioned by a different district court under 28 USC Sec. 1927. The Second Circuit affirmed both the judgment against Ms. Smiga and the monetary sanction of $1700.23 leveled by the district court against this attorney.

THE COURT SHOULD DEFER CONSIDERATION OF THE INSTANT PETITION AND COMBINE IT WITH THE SMIGA PETITION FOR CERTIORARI.

The identical issue of due process is presented in both the instant Chapman petition and the forthcoming petition for certiorari to be filed by both Ms. Smiga and attorney Chapman. The clear denial of due process to Ms. Smiga is the only added element on appeal. Inasmuch as that denial sounds in the decision of the Second Circuit -- with little or no reference to the original judgment of the court below -- the fact pattern attending her petition lends itself perfectly to a combined consideration of the due process issue raised by the two petitions with comcomitant judicial economy.

The Court is respectfully requested to defer its consideration of the instant Chapman petition and to consider the two petitions for certiorari jointly upon the filing of the Smiga Petition.

THE SECOND CIRCUIT AFFIRMANCE IN SMIGA IGNORED THE FACT THAT ITS OPINION MANDATED VACATUR OF ANY SANCTION AGAINST PETITIONER.

The Smiga decision underscores the criticism of the Second Circuit by the Committee on Federal Courts of the Association of the Bar of the City of New York for the "practice" of denying fundamental fairness and due process to attorneys. In the Tedeschi case from which the instant Chapman Petition is drawn, the 2nd Circuit emblazoned its stamp of approval upon denial of due process by a district court below by increasing a monetary sanction without notice or legal justification, purportedly under Rule 38, Federal Rules of Appellate Procedure.

In Smiga, incredibly, the Court itself contrived to deny fundamental fairness and due process to both this attorney and his client by "manufacturing" out of thin air a controlling "order" upon which affirmance of the district court was then based.

The issue in Smiga -- to be fully briefed in the forthcoming Petition for Certiorari -- must be touched upon in this Supplemental Brief. Very simply, the court of appeals agreed with this petitioner that the district court below was without jurisdiction to confirm the arbitration award at issue. This point had been argued in the district court and again on appeal.

The $1700 monetary sanction imposed by the district court is therefore totally unwarranted under 28 USC Sec. 1927 where accurate arguments were advanced in opposition to an award confirmation. Nevertheless, the 2nd Circuit failed and refused to reverse such sanction. The affirmation of the judgment against Ms. Smiga on an entirely different and unknown basis is consequently an irrelevancy and mandates vacatur of the attorney sanction.

The accuracy of the legal arguments advanced by this Petitioner in the Smiga

case was conceded by the 2nd Circuit in these words:

> We agree with Smiga that no submission agreement was executed and no agreement was entered explicitly granting a court the right to enter judgment. In our view, nevertheless, the equivalent of an order to compel arbitration exists herein and therefore we believe the district court had jurisdiction to confirm the award.
>
> ***
>
> However, we find that, assuming an order to compel was the proper procedure, the district court's order denying Smiga's motion to stay arbitration was essentially the equivalent of an order by the district court to compel arbitration. (Slip Opinion, Smiga v. Dean Witter Reynolds, No. 798, 2nd Cir at 4949).

The panel of the 2nd Circuit which agreed that the court below lacked jurisdiction to confirm the arbitration award against Ms. Smiga was bound to so find by the precise language of Section 9 of the Arbitration Act, 9 USC and by its own controlling precedent. Thus in Varley v. Tarrytown Associates, 477 F2d 208 (CA2/1973) the 2nd Circuit held:

> In view of the explicit language of Section 9 of the [Arbitration] Act requiring such agreement ["that a judgment of the court shall be entered upon the award..."] and finding none, we have no alternative but to reverse. (Id. at 210)

The Smiga panel likewise found no such agreement and should have reversed. (See, Slip Opinion at pp. 4948 and 4949). Instead the court invoked legal legerdemain and a judicial alchemy found in no book of law and converted an unappealable order denying a stay of arbitration into an order to compel arbitration (which is appealable) nearly two years later. The denial of procedural due process to Ms. Smiga is readily apparent -- the Arbitration Act gives her the right to a jury trial where, as here, she disputes the existence of an arbitration agreement.

In addition to the arbitrary conversion of an unappealable denial of a stay order into an appealable order to compel arbitration, ex post facto, there

was at no time any petition or motion made by the opposing litigant to compel arbitration. How, indeed, can an order compelling arbitration come into existence without adherence to Section 4 of the Arbitration Act? 9 USC Sec. 4 provides:

> A party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court ... for an order directing that such arbitration proceed ....

This Court recently decided three cases settling various issues relative to arbitration controversies. Each case was precipitated by the statutory motion or petition to compel arbitration. See, Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 US 1 (1983); Southland Corporation v. Keating, ___US___, 104 S Ct 852, 79 LEd 2d 1 (1984) and last but certainly not least, Dean Witter Reynolds v. A. Lamar Byrd, ___US___, 53 LW 4222, March 5, 1985. The failure to bring

on a Section 4 petition to compel Ms. Smiga to arbitrate is a fatal jurisdictional defect, deprived her of a statutory procedure and consequent denial of a precious constitutional right not to be deprived of property without due process. And what of Ms. Smiga's appeal as of right to which she would have been entitled two years ago had she known an order to compel arbitration had come into existence? 2nd Circuit precedent grants her that right ("an order compelling arbitration under 9 USC Sec. 4 is appealable as a final order." Karavas v Atlantica, 588 F2d 1 {CA2/78}; Waarden v Smith, 532 F2d 874 {CA2/76}; Interocean Shipping Co., v National Shipping & Trading Corp., 462 F2d 673 {CA2/72}) but the same circuit now has issued the functional equivalent of a gag order. She has been bludgeoned into silence without an iota of due process.

Despite the "evil" "practice" of the 2d Circuit toward attorneys, this denial of due process to Ms. Smiga comes as an astonishment and a gloomy harbinger for the future of the Constitution in the 2d Circuit.

The conclusion is inescapable that the 2nd Circuit has embarked on a reckless, benighted and unconstitutional campaign against litigants and members of the bar. Its motive is murky; however, it is clear that this "evil thing" (as charged by the prominent member of the bar mentioned in the instant Petition for Certiorari at page 18) must be addressed by this Court. This conduct of the ?nd Circuit has now become a national scandal.

The stinging criticism leveled at the 2nd Circuit by the Report of the Association of the Bar of the City of New York (REPORT) -- annexed to the Petition for Certiorari heretofore filed -- is now perceived to be a polite understatement.

THE SUPREME COURT MUST HALT THE UNCONSTITUTIONAL CONDUCT OF THE SECOND CIRCUIT.

The REPORT of the City Bar, issued in June of this year, has had no evident impact upon the Second Circuit. It continues to flail and threaten selected attorneys and litigants in recent weeks. It is determined to pursue an authoritarian and totalitarian stance in outright defiance of this Court, instructions of Congress and the fundamental precepts of the United States Constitution. The Smiga decision is but one of several that have been cited at the beginning of this paper. A tragic footnote to the Adamsons case is that the 75 year-old sole practitioner represe ting Dr. Adamsons died a few days after the 2d Circuit decision. His secretary states the death was the direct result of the harsh sanction imposed.

In the context of this discussion, a decision of the 2d Circuit within recent

days as to the famous (or infamous) "Westway" project here in New York City (Sierra Club et al v. U. S. Army Corps of Engineers et al, 2d Cir Slip Opinion 304, 315, Sept. 11, 1985) contains challenging language. The court opened its discussion with these words:

> A change in something from yesterday to today creates doubt. When the anticipated explanation is not given, doubt turns to disbelief. This case is capsulized in that solitary simile.

and then stated:

> No court should allow the use of semantics to succeed in an attempt at glossing over an environmental violation [due process deprivation?]. Neither Judge Griesa nor we are required to defer to the [Army] Corps' [of Engineers] Orwellian-like "doublespeak,"...
>
> ***
>
> Thus, the change ... required an explanation and that explanation should have been in the final report. Neglecting to include it illustrates again the insight of Franklin's maxim that "a little neglect may breed great mischief."

The 2d Circuit itself is guilty of just such "doublespeak". In Smiga, a stay denial of "yesterday" viewed through the 2d Circuit "looking glass" became "todays" order to compel -- without a motion, without notice, without authority in law -- and without an explanation. Yet to be heard is an explanation of how an order can be both appealable and non-appealable.

Upon such doubletalk, Ms. Smiga is deprived of $13,000 and her attorney, who correctly argued that the district court lacked jurisdiction to enter that judgment, is sanctioned. Mirabile dictu!

Except for striped bass in the Hudson River, due process is dead in the 2d Circuit. And attorneys are whipping boys and 5th class citizens. It is time for the Supreme Court to call a halt to the "evil" practices of that Circuit.

These two cases involving attorney Chapman have the promise and ingredients to

become the Watergate of the 2d Circuit; the Dreyfus Affair of the legal system. The "cover-up" of unconstitutional deprivations of property and the denial of due process to United States citizens is a national scandal. The time is now for the Supreme Court to address the issue and fix the bounds of Rule 38 which does not explicitly allow monetary sanctions against attorneys; to compel strict adherence to the congressional mandate accompanying 28 USC 1927 that a "court is to afford the attorney all -- not a few or some -- all appropriate protections of due process available under the law;" and to make certain that this Court's instruction in Roadway Express v Piper, 447 US 752, 767 that "attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." is no longer spurned.

The rampant neglect of fundamental fairness and due process concepts by the 2d Circuit has resulted in "great mischief" with no end in sight.

Forty years ago Justice Roberts of this Court foresaw "great mischief" and "evil" where proper adherence to authority was not followed. In Mahnich v Southern S.S. Co., 321 US 96, 112-113 (1944) he made a strong argument in dissent against what he considered the "evil resulting from overruling considered decisions." and warned that if federal courts do not feel bound to follow and apply the law as announced by the Supreme Court, "the law becomes not a chart to govern conduct but a game of chance." Justice Roberts suggested:

> [Litigants] will not know whether to litigate or to settle for they will have no assurance that a declared rule will be followed. But the more deplorable consequence will inevitably be that the administration of justice will fall into disrepute.

As recently as 1980 this Court in similar vein announced in Mohasco Corp. v Silver, 447 US 807, 826:

> [I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.

In both Tedeschi (Chapman) and now Smiga, the abject failure and refusal of the 2d Circuit to follow this Court and the Legislature warrants certiorari. This Petitioner was afforded none of the due process requirements explicated by the Constitution, by this Court in Roadway and Mohasco or by the Congress in relation to 28 USC 1927.

This unconscionable inquisition of this Petitioner in these two cases should be responded to by this Court -- on behalf of the entire bar and all citizens -- by granting certiorari on both and restoring due process rights and privileges in the 2d Circuit.

AN APPLICATION BY PETITIONER FOR ADMISSION TO THE SUPREME COURT BAR WILL RAISE THE DUE PROCESS ISSUE.

In order to proceed with Ms. Smiga's Petition for Certiorari (due within 90 days of September 10, 1985) Petitioner Chapman will have to apply for admission to the Supreme Court Bar. Question 12 on the application asks if the applicant has been disbarred, suspended or reprimanded. The district court in Tedeschi stated that its sanction carried with it "condemnation of [Chapman's] professional conduct." (Petition, Appendix "A", p. 9) and that he was "reckless and mendacious" (Id at p.11).

This Court should know that on the oral argument of the Tedeschi (Chapman) appeal in the 2d Circuit, Petitioner demanded of the Panel that it commence disbarment proceedings. The demand was greeted with stony silence. So also was the demand for an evidentiary hearing on June 7, 1983 in the district court and then

again three times in the court of appeals (Petition, p. 15).

Why no evidentiary hearings? The 2d Circuit can't stand the heat of a full-blown exposure of the false accusations and distortions of the record by an overreaching district court; it can't tolerate the illumination of the accusations never noticed to Petitioner; it can't bear the embarrassment of events twisted beyond recognition by the lower court, whether deliberate or not; nor the glare of publicity on the failure to allow a reply to an affidavit requesting $50,000 in attorney's fees (Petition pp. 9-14) The truth is that the 2d Circuit has been bullying and intimidating members of its bar for some time in a misguided campaign to diminish its case load. Due process has given way to expediency; the 5th Amendment is an anachronism. But-- even Alfred Dreyfus had a hearing. Watergate.

Therefore, Petitioner's answer to Question 12 on the Application will be now and ever that no reprimand is possible under the U. S. Constitution, where: unnoticed accusations were made; no evidentiary hearings were held; hearings were denied; and -- to the contrary -- Petitioner was defamed by the 2d Circuit.

SUMMARY AND CONCLUSION

It would be singularly appropriate for this Court to grant certiorari in both this situation and the Smiga case and combine the appeals. Both cases reflect ongoing practice decried by the REPORT of the City Bar. The opposing attorneys each in turn referred to the other case on appeal, blatantly appealing to and seeking to, prejudice, Petitioner. The 2d Circuit -- over vigorous objection by Petitioner -- schedduled the appeal hearings within two days of each other. This was an act of outright brutality, to say nothing of the tandem

scheduling of the appellate briefs. Be that as it may, Smiga underscores the "game of chance" going on in the 2d Circuit with the resultant "doubt and disbelief" that justice and due process are available in the 2d Circuit. Except, that is, for the fish and the favored.

The egregious denial of due process to Petitioner in the Tedeschi case -- now demonstrated to be a pattern in the 2d Circuit -- must now be addressed by this Court. Attorneys and litigants alike, nationwide, have a right to know now where the judicial system is going.

Petitioner respectfully prays that the Court grant Certiorari on this Chapman Petition and combine it with the forthcoming Smiga Petition.

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New York, New York

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